SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 611

MISSISSIPPI POWER & LIGHT COMPANY,
Appellant,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi (App. A) is reported at ..... Miss. ....., 222 So. 2d 399 (1969). The opinion of the Chancery Court of Hinds County is set forth in Appendix B, *infra*, pp. A14-A18. The Order of the Mississippi Public Service Commission is set forth in Appendix C, *infra*, pp. A18-A32.

JURISDICTION

Capital Electric Power Association ("Association") instituted a proceeding before the Mississippi Public Service Commission ("Commission") to compel Mississippi Power & Light Company (appellant) to cease to serve an area certificated to Association under the Public Utility Act of 1956, Section 7716-01, *Recompiled Mississippi Code of 1942*, et seq., and to remove its facilities from the disputed area. Appellant claimed the non-exclusive right to serve the area under perpetual statutory franchises granted by the Mississippi legislature in 1860 and 1888. The requested relief was granted to Association in an order by the Commission, dated October 6, 1964. This order was affirmed by the Chancery Court of Hinds County, in a final decree dated November 20, 1967. Appellant appealed to the Supreme Court of Mississippi, which affirmed the Chancery Court. The judgment of the Supreme Court of Mississippi was entered April 21, 1969, and became final fifteen days thereafter. No petition for rehearing was filed. Notice of appeal was filed in the Supreme Court of Mississippi on July 3, 1969. This Court enlarged the time for docketing the appeal to September 10, 1969.

The jurisdiction of this Court to review the decision and judgment of the Supreme Court of Mississippi in this case is conferred by 28 U.S.C. § 1257(2). See *Russell* v. *Sebastian*, 233 U.S. 195 (1914); *Vicksburg Waterworks Co.* v. *City of Vicksburg*, 185 U.S. 65 (1902); *City of Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 206 U.S. 496 (1906); *Detroit United Railway* v. *People of the State of Michigan*, 242 U.S. 238 (1916); *Walla Walla* v. *Walla Walla Water Company*, 172 U.S. 1 (1898); *Charles River Bridge* v. *Warren Bridge*, 11 Peters 420 (1837); *Grand Trunk Western Railway Company* v. *Railroad Commission of Indiana*, 221 U.S. 400 (1911); *Appleby* v. *Delaney*, 271 U.S. 403 (1926).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 10, of the United States Constitution provides in part that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

Section 7716-05, *Recompiled Mississippi Code of 1942;* Chapter 372, Section 5, the Public Utility Act of 1956, is set out in Appendix D, *infra*, pp. A33-A38.

Chapter 343, *Laws of Mississippi, 1860,* is set out in Appendix E, *infra*, pp. A38-A39.

Chapter 427, *Mississippi Laws of 1888,* amending the above, is set out in Appendix F, *infra*, pp. A40-A41.

Chapter 424, *Mississippi Laws of 1888,* is set out in Appendix G, *infra*, pp. A41-A44.

QUESTION PRESENTED

Where an electric distribution system was built and is being operated by appellant as a utility to serve "in the City of Jackson and its suburbs * * * [with] the right of way over all the streets and alleys of the City of Jackson and the public roads adjacent thereto * * *", pursuant to perpetual statutory franchises granted by a state (as evidenced by Chapter 343, *Laws of Mississippi, 1860* and Chapters 424 and 427, *Laws of Mississippi, 1888*, Appendices "E", "G", and "F" hereto), may the state impair the obligation of any of these franchises by later granting an exclusive franchise to another utility so as to prohibit the first utility from serving in an area later annexed to the City of Jackson.

STATEMENT

Prior to 1890, the State of Mississippi enacted the statutes (hereto annexed as Appendices "E", "F", and "G") setting forth the terms of the contracts at issue. These statutes, without any reservation of the State's right to amend or repeal the same, conferred upon appellant's predecessors in title perpetual contractual charter franchises. The Jackson Gas Light Company was franchised to supply "consumers" and "to erect poles along and through the streets and alleys" of the City of Jackson, Mississippi (App. E and F, Vol. IX, R. 1155, 1160); and the Light, Heat and Water Company was franchised "to sell such light * * * in the City of Jackson and its suburbs", with "* * * the right of way over all the streets and alleys of the City of Jackson and the public roads adjacent thereto * * *" (App. G, Vol. X, R. 1429).

In reliance on these franchises, an electric light plant was built in the City of Jackson, Mississippi and electric service has been continuously furnished to the inhabitants of the City. When appellant's franchises were originally granted, the area now in dispute (Exhibit 1, Vol. I, R. 19; Vol. VI, R. 811; cross-hatched in yellow) was about two miles from the westerly limits of the City of Jackson (Vol. IX, R. 1128). As the City of Jackson expanded, appellant constantly expanded its facilities. (For example, see Vol. XI, R. 1521, 1531, Exhibit 53). The City's gradual expansions from 1872 to 1960 are shown on the Association's Exhibit 14 (Vol. VIII, R. 986). The last expansion of the City before the one involved here (in 1960) was in 1949 (Vol. VIII, R. 982); and, prior to the 1960 expansion, the disputed area was immediately adjacent to the City limits on the west and north (Vol. VIII, R. 982)—substantially an island within the City (Vol. IX, R. 1129). As of the date of the last expansion on March 17, 1960, appellant was the

sole supplier serving the entire City of Jackson as it then existed (Vol. VIII, R. 983), in addition to six services, including the City of Jackson, within the disputed area.

Exhibit 3 (Vol. VII, R. 836) shows the appellant's services in the disputed area: 6 connected prior to March 29, 1956, none connected from then to March 17, 1960, and 19 connected from March 17, 1960 to July 28, 1964. Appellee has furnished electric service in the disputed area since September, 1939 (Vol. VII, R. 815).

In 1956, the Public Utilities Commission Act (Chapter 372, *Mississippi Laws of 1956;* Sections 7716-01, et seq., *Recompiled Mississippi Code of 1942;* hereinafter referred to as the "Act") (App. D), conferred grandfather certificates of public convenience and necessity upon utilities to continue to serve all facilities then being served by them, requiring only an application therefor. Appellee applied for and received a grandfather certificate (Exhibit 4, Vol. VII, R. 847; Vol. VII, R. 913) to serve the disputed area (described by metes and bounds). Appellant applied for and received a grandfather certificate to serve in accordance with the 1860 and 1888 statutory franchises, which were annexed as exhibits to its application[1] (Vol. X, R. 1495).

Prior to March 17, 1960, appellant was serving the entire City of Jackson as it then existed (Vol. VIII, R. 983). This proceeding was brought by appellee to enjoin appellant from serving customers not being served on March 29, 1956, the effective date of the Act, in the disputed area annexed to the City of Jackson on March 17, 1960.

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1. These legislative franchises were the only franchises relied upon by appellant in applying for a grandfather certificate, except for a franchise granted by Hinds County with respect to a transmission line bringing electricity through that county to the City of Jackson for distribution (Vol. X, R. 1471).

Appellant challenged appellee's assertion of an exclusive right to serve the area in question, and, *inter alia*, specifically contended that the perpetual legislative franchises were unimpairable obligations of contract which were protected by Art. I, Section 10, *United States Constitution*, as well as by the Fifth and Fourteenth Amendments thereto (Vol. V., R. 578; see also Vol. XI, R. 1617).

In enjoining appellant from serving in the disputed area, the Mississippi Public Service Commission made clear the sole ground on which it acted (Vol. XI, R. 1605):

> "We do not consider the above referred to laws granting corporate charters, the municipal franchise, street lighting contract, pumping plant contract or Hinds County franchises, to be germane to any of the issues in this cause. Therefore, we disregard them completely as we believe they have no bearing on this case. The Commission, however, does not decide on the validity of any of the acts of the Mississippi Legislature referred to granting of corporate charters municipal franchise of the City of Jackson, Hinds County franchises, the street lighting contract or pumping plant contract of the City of Jackson, nor attempt to interpret or construe any of their provisions. The Commission's decision is based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket No. U-44 and U-84. The first certificate does not include the disputed area. The second certificate does include the area in dispute."

The Chancery Court of Hinds County, in affirming the cease and desist order of the Commission, rejected appellant's claim of constitutional protection.

Appellant appealed to the Supreme Court of Mississippi. In Points I, II, and IV of its argument, appellant raised the issue of impairment of contract in violation of Article I, Section 10, of the United States Constitution.

In Point III, appellant argued that the protections of the Fifth and Fourteenth Amendments had been violated.

The Supreme Court of Mississippi rejected appellant's constitutional contentions based upon the 1860 and 1888 legislative franchises.[2] It first held, applying a doctrine of strict construction, that the enactments of 1860 and 1888 were for "* * * the single purpose of granting charters of incorporation and enumerating the powers of the corporations so chartered * * *", not giving rise to any contractual relationship between state and utility. 222 So.2d at p. 403.

Further, the court below held that the language of the 1860 and 1888 franchises could not be construed to include an area which, at those times, was neither "* * * a part of the City of Jackson, nor of its suburbs. * * *" 222 So.2d at p. 404.

Finally, the court below held that, assuming appellant's right to serve the disputed area was conveyed by the 1860 and 1888 charters, the right had been abandoned since appellant has served the area only since 1939 and has, since that date, only served six connections. 222 So.2d at p. 404.

THE QUESTION IS SUBSTANTIAL

1, This case plainly falls within the appellate jurisdiction of this Court under 28 U.S.C. § 1257(2). The Supreme Court of Mississippi, the highest court of the state in which a decision can be had, has affirmed rulings by the Commission and Chancery Court which have rejected appellant's contention that it has perpetual legislative franchises, protected by Article I, Section 10, of the

2. In the proceedings below, appellee challenged appellant's title to these franchises. The court below, in its decision, assumed the validity of appellant's title. 222 So. 2d at p. 402.

United States Constitution, which authorize it to serve the disputed area. The ruling of the Commission thus affirmed, holding that the 1956 certificate granted appellee under the Public Service Commission Act is exclusive, is a "statute" within the meaning of 28 U.S.C. § 1257(2). in *Live Oak Water Users' Association* v. *Railroad Commission of California*, 269 U.S. 354 (1926), this Court held (at p. 356):

> "The cause is here upon writ of error. Considering the circumstances disclosed by the record, we have no jurisdiction unless it affirmatively appears that in the court below there was duly drawn in question the validity of a statute of or an authority exercised under the State because of repugnance to the Constitution, treaties or laws of the United States. Jud. Code § 237, as amended Sept. 6, 1916. Under repeated rulings here, for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature. *Lake Erie & West. R. R. Co.* v. *State Public Utilities Commission ex rel. Cameron*, 249 U.S. 422, 424, and cases there cited."

See also *Grand Trunk Western Railway Company* v. *Railroad Commission of Indiana*, 221 U.S. 400, 403 (1911); *Appleby* v. *Delaney*, 271 U.S. 403, 409 (1926).

Nor is this Court's appellate jurisdiction dissipated by the method of decision selected by the court below. As this Court noted in *Louisiana Railway & Navigation Company* v. *Behrman, Mayor of the City of New Orleans*, 235 U.S. 164, 170 (1914):

> "* * * It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In

such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give validity and operation to the subsequent law and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee. * * *"

See also *Sultan Railway & Timber Company* v. *Department of Labor and Industries of the State of Washington*, 277 U.S. 135 (1928); *Lake Erie & Western Railroad Company* v. *State Public Utilities Commission of Illinois*, 249 U.S. 422 (1919).

Appellant contends that the decision below is entirely erroneous. The legislative franchises of 1860 and 1888, accepted and continuously implemented over many years by appellant, gave rise to a constitutionally protected contract. In no sense were these enactments mere corporate charters to be strictly construed against the corporation. Further, the scope of the franchise is clear. Appellant was authorized and committed to serve the City of Jackson as it grew. Finally, there is no warrant for the finding of abandonment by the court below.

A. **The Contractual Nature of the Franchises.** On February 10, 1860, the Legislature enacted Chapter 343, *Laws of Mississippi 1860*, (Appendix E, Vol. IX) R. 1155, which incorporated the Jackson Gas Light Company with power to "exercise all the rights and privileges which are usual to corporations within the scope and design of its creation", and to "make all needful rules and regulations for the management of said gas works, and fix the terms and conditions on which gas will be supplied to con-

sumers." The charter did not limit the "consumers" to be supplied.[3]

Necessarily, with plenary power in the State over streets, roads and public lands, there was an implied easement granted so that the franchise would be effectual to serve "consumers." See *Hodges* v. *Western Union Tel. Co.*, 72 Miss. 910, 914, 18 So. 84 (1895); see also *Russell* v. *Sebastian*; 233 U.S. 195, 207 (1914).

This charter was amended by Chapter 427, *Mississippi Laws of 1888*, approved March 7, 1888 (Appendix F, R. 1160, Vol. IX) which provided that:

> "* * * The said Jackson Gas Light Company is fully authorized and empowered to erect poles along and through the streets and alleys of said city on which to suspend its wires, lamps and other appurtenances * * *".

Appellant later acquired the franchise of the Light, Heat and Water Company. The charter of this company (Appendix G, Vol. X, R. 1429), Chapter 424, *Mississippi Laws of 1888*, approved February 23, 1888, p. 602, incorporated the company, its successors and assigns, and granted perpetual succession. The charter further provided in pertinent part:

> "SECTION 3. Be it further enacted, That said Company shall have power * * * *to sell such light*, heat and water on such reasonable terms as said directors may from time to time establish, *in the city of Jackson and its suburbs.* * * * *That the right-of-way over all the streets and alleys of the city of Jackson*

3. Under Chapter XXV, Sec. II, Art. 4, *Mississippi Code of 1857*, p. 291, the franchise was perpetual:

> "ART. 4. Every corporation created under this act, and all others not otherwise provided for, shall have succession for the time limited in the charter, and if no time be limited, then perpetual succession; * * *".

and the public roads adjacent thereto is hereby granted said company for its pipes, wires, poles and appliances for the purposes aforesaid * * *"/ (Emphasis supplied).

The evidence shows that pursuant to said grants, there was erected at the corner of Pearl and Congress Streets, in Jackson, an electric plant before 1890 (Vol. IX, R. 1165, 1171). The Jackson Gas Light Company, and the Light, Heat and Water Company, were specifically named as offerees, and their acceptance of these franchises by constructing facilities serving the entire City as it expanded constituted an unimpairable contract. The continued maintenance, construction, expansion and extension of facilities are "* * * acts of acceptance * * *" which create an "* * * irrevocable contract * * *" between appellant and the State. *Southern Bell Tel. & Tel. Co.* v. *Meridian*, 241 Miss. 678, 131 So.2d 666, 670 (1961); *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913); *Fletcher* v. *Peck*, 6 Cranch. 87, 137 (1810). Compare *New Jersey* v. *Wilson*, 7 Cranch. 164, 166 (1812).

A charter which grants certain positive, and valuable rights thus becomes a contract, protected from impairment. *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819). Operation of facilities serving the public under such a charter is both acceptance of the contract and sufficient consideration to enable a charter or franchise to obtain the status of a contract. *City Railway Company* v. *Citizens Railroad Company*, 166 U.S. 557 (1897); *Walla Walla* v. *Walla Walla Water Company*, 172 U.S. 1 (1898).

The *Southern Bell* cases are very much in point. (*Southern Bell Telephone & Telegraph Company* v. *City of Meridian*, 154 F. Supp. 736 (S.D. Miss., 1957), affirmed 256 F.2d 83 (5th Cir., 1958), judgment vacated and case remanded to District Court with instructions to hold the case, 358 U.S. 639 (1959); *Southern Bell Telephone & Telegraph*

Company v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666 (1961).) In that case, the City of Meridian, acting under a 1956 State statute, imposed a two per cent charge on gross revenues for the use of the streets by Southern Bell. Southern Bell claimed that an irrevocable franchise was granted to its predecessors by an act of the Legislature of the State of Mississippi in 1886, which granted telephone companies the right to construct, maintain and operate telephone lines along the streets. The District Court said, at 154 F. Supp. 736, 740:

> "The question now arises whether or not the plaintiff in this case and its predecessors in title had accepted the privileges granted by the Laws of 1886 so as to constitute a contract between the State and the companies that is protected by the federal and state constitutions. The authorities are unanimous that it is a binding contract and to change its terms would be to impair the obligations of a contract and conflict with the U. S. Constitution. * * * This question has been before the Supreme Court of the United States, as well as many of the states, and all the courts hold that where there has been an offer and an acceptance by conduct, then a binding contract is created and the offer by the state to companies of benefits when accepted by any utility is irrevocable and is more than mere license to use the streets at the will of the legislature. * * *"

In the instant case, the State of Mississippi granted appellant's predecessors the right to supply electricity to the City of Jackson and its suburbs. There is no question that these grants were accepted: not only was a light plant built before 1890, but city-wide electric service has been furnished continuously to Jackson as it expanded. Such acceptance, under *Southern Bell*, created an irrevocable contract. The District Court in that case continued, at 154 F. Supp. 736, 743:

"* * * In 1890 plaintiff's predecessors were already doing business in the State and had acquired vested property rights that were irrevocable, and nothing but a clear intent to abandon those property rights or to relinquish them could deprive plaintiff or its predecessors of those rights. * * *"

The Court of Appeals affirmed the decision of the District Court. This Court did not rule on the merits of the case, but instructed the District Court to hold the case, pending decision by the Mississippi courts on unsettled questions of state law. The Mississippi Supreme Court found the two per cent charge unconstitutional, holding (241 Miss. at pp. 693-694):

"Miss. Laws 1886, Ch. 38, Sec. 1, quoted above, *constituted an offer by the State* to telephone and telegraph companies to use highways and streets for the purpose of providing citizens with telephone service without any requirement of paying compensation to either municipalities or the State. The continued maintenance of poles, lines and other facilities by its predecessors and appellant, after 1886, as well as the *continued construction, expansion, and extension of such lines on the public streets of Meridian constituted an acceptance* by Southern Bell and its predecessors of the offer of the right to use the streets, which was contained in the 1886 act. Under such circumstances, the great weight of authority holds that these acts of acceptance resulted in the creation of an *irrevocable contract* between appellant, on the one hand, and the State, on the other, which is protected from impairment by the contract clause of the State Constitution. * * *.

* * *

"* * * Sebastian and many other cases hold that the scope of the grant is not measured by the use of the streets at any given time, but as an entirety, by the undertaking invited and encouraged by the grant. * * *." (Emphasis supplied).

B. **The Scope of the Legislative Franchises.** Thus, the charters granted to appellant's predecessors in title constitute unimpairable contracts. Furthermore, these charters include the disputed area, and thus to deprive appellant of the right to serve this area is an impairment of the obligation of the contracts. Not only do the charters refer to the City of Jackson, but the Light, Heat and Water Company franchise (Appendix G) specifically granted the corporation the right "to sell such light * * * in the City of Jackson and its suburbs" and granted the "right-of-way over all the streets and alleys of the City of Jackson and public roads adjacent thereto * * *."

The court below sought to limit the clear purpose and language of these legislative franchises by measuring their scope as of the dates of enactment. The court below stated that it could not assume that the Legislature in 1860 and 1888 intended to convey a franchise indefinite in extent, which would include territory not then a part of the City of Jackson or a suburb of that city. 222 So.2d at p. 404. In other words, the court below found it unreasonable to assume that the legislative franchises were intended to expand as the city expanded and, on that basis, imposed a limitation on the franchises solely for the purpose of excluding the disputed area here in issue.

This basic assumption in the opinion below as to the static nature of the franchise is erroneous. In construing the scope of franchises granted, such as those here involved, to utilities, the only reasonable assumption is that the franchise is flexible and that it embodies a legislative recognition that the city or territory covered will grow. In *Illinois Central Railroad Company* v. *Chicago*, 176 U.S. 646 (1900), this Court observed that, in enacting legislation which referred to a city's boundary, the Legislature

presumably foresaw the possibility of growth. The Court said (176 U.S. at p. 665):

> "* * * The road, as originally constructed, ran through an almost uninhabited country, and yet a country which gave promise of a large population and of great cities being built up along the line of the road; and it is highly improbable that the growth of the State should not have been foreseen and contemplated in this legislation. * * *"

The assumption as to the legislative intent recognized by this Court in the *Illinois Central* case is the only reasonable basis for construing franchises such as here involved. In fact, appellant's service has expanded as the City of Jackson has expanded. And there is no rational basis for treating the 1960 expansion on any different basis from the earlier expansions of the city insofar as the reach of appellant's franchises is concerned.

In construing the scope of appellant's franchises, the court below also made reference to a principle that the corporate charter must be construed strictly against the corporation. Assuming that this principle has any application to a situation such as that here presented, it does not apply where, as here, the language of the franchises is clear. *Minneapolis* v. *Minneapolis Street R. Co.*, 215 U.S. 417, 427. Appellant is authorized to serve the City of Jackson and its suburbs. For some time prior to 1960, the disputed area had become a suburb of the city and, in 1960, became part of the city. In short, there is no ambiguity which calls into play a so-called rule of strict construction. Again, the past practice, the fact that appellant has expanded its facilities as the City of Jackson has expanded, demonstrates a constant construction of the language of the franchises contrary to the reading given by the court below.

The court below also sought to support its limited reading of appellant's franchises by reference to its prior decision in *Delta Electric Power Association* v. *Mississippi Power & Light Company*, 250 Miss. 482, 149 So.2d 504, appeal dismissed 375 U.S. 77 (1963). This case held that a *municipally*-granted franchise does not expand into an area later annexed to the municipality, because the municipality does not have the power initially to grant a franchise to an area outside its boundaries. Here, however, the franchises were granted by the sovereign State, not a municipality, with no such limitations on its power.

C. **The Finding of Abandonment.** The Supreme Court of Mississippi found that, even if appellant had a franchise which covered the disputed area, it had abandoned any rights it might have had thereunder. Appellant contends that such finding was improper. The Commission, which has exclusive original jurisdiction over the business and property of public utilities (Section 7716-04, *Recompiled Mississippi Code of 1942*) made no finding of abandonment. The Chancery Court of Hinds County, on initial review of the Commission's order, made no such finding. The finding was made for the first time in this proceeding by the court below.

Moreover, the finding is erroneous. Abandonment is a question of intent, and "where abandonment or waiver of a vested property right is claimed, the intention to abandon or waive it must be shown by 'full and clear' evidence." *Southern Bell Tel. & Tel. Co.* v. *Meridian*, 241 Miss. 678, 793, 131 So.2d 666, 675; see also *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 597 (1911).

Here, the evidence is to the contrary. The disputed area was not annexed by Jackson until 1960 (Vol. VIII, R. 981). Thus, appellant should not be considered to have abandoned its right to serve a part of Jackson, until it be-

came vested by annexation in 1960. Furthermore, the Commission found that "* * * Mississippi Power & Light Company, has since June, 1960, built electric distribution facilities and provided services and offered to provide services in the disputed area" to numerous individuals in the disputed area, including "30 street lights" (Finding 15, pp. A28 and A29 of Order, Vol. XI, R. 1602, 1603). Further, the Commission found that appellant, unless ordered to cease and desist, would continue to offer to serve the disputed area (Finding 16, pp. A29-A30 of Order, Vol. XI, R. 1604). The evidence shows that these charter franchises were "* * * the only franchises * * *" specifically covering the City of Jackson and its suburbs claimed by the appellant from 1944 until March 29, 1956 (Vol. X, R. 1446).

In short, the evidence fully demonstrates appellant's intent to serve the City of Jackson and its suburbs in accordance with the full scope of its franchises.[4]

The situation is comparable to that before this Court in *Russell* v. *Sebastian*, 233 U.S. 195 (1914). There, this Court held that a grant of the privilege to lay pipes in the streets, which was not specifically confined in scope, was a grant for the entire city, and as new streets were built, the pipes could be accordingly extended, without additional grants. When the original grant was accepted, it "* * * became binding—not foot by foot, as pipes were laid, but as an entirety * * *". 233 U.S. at p. 207.

Appellant, therefore, contends in summary that it has a state-granted, contractual right to serve the area in dispute, and that the Commission's interpretation of the Public

4. In addition, it should be noted that a franchise must be considered in existence and not forfeited for non-use until there is a judgment of forfeiture in a direct proceeding instituted in the name of the state for that purpose. *Dorr* v. *Board of Levee Commissioners for Yazoo-Mississippi Delta*, (Miss. 1900) 28 So. 938. This is a question of state law. *New York Electric Lines* v. *Empire City Subway Co.*, 235 U.S. 179, 195 (1914).

Service Commission Act in its order enjoining such service is a State law which impairs the obligation of appellant's constitutionally protected contract. The Supreme Court of Mississippi upheld the validity of a State "statute" in upholding the order, and this decision is therefore directly appealable to this Court. *Detroit United Railway* v. *People of the State of Michigan*, 242 U.S. 238 (1916).

2. The question herein presented merits plenary consideration by this Court.

Long-range planning by governmental authorities and by the utilities involved is essential to the orderly development of the growing municipalities of our nation. As areas are annexed to municipalities, cities must furnish sewerage and water, and the utilities must expand their facilities to provide light, gas and water. In *Russell* v. *Sebastian*, 233 U.S. 195, 209 (1914), this Court quoted with approval the decision in *People ex rel. Woodhaven Gaslight Co.* v. *Deehan*, 153 N.Y. 528, 533 (1897), wherein it is held in part:

> "* * * 'It is well known that business enterprises such as the realtor is engaged in *are based upon calculations of future growth and expansion*. A franchise for supplying gas not only confers a privilege, but imposes an obligation upon the corporation to serve the public in a reasonable way. The realtor is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the realtor is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas

> for public and private use, such grant *necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as the old.*'" (Emphasis supplied).

The State of Mississippi, nearly one hundred years ago, foresaw that its capital city would grow, and granted these franchises to insure that the central station electricity requisite for municipal growth would be furnished by the grantees of the franchises.

Note that said in 1895 by the Supreme Court of Mississippi as to the water portion of one of these very franchises in *Light, Heat & Water Co.* v. *City of Jackson*, 73 Miss. 598, 643, 19 So. 771:

> "We know that the machinery, mains and appliances required for supplying the city with water are costly to begin with, and of relatively little value if removed when once located. Permanency of the plant is essential to the realization of any profit in the enterprise, and in cities having no greater population than that of Jackson, the use of water for municipal purposes would probably be a prerequisite to secure the investment of the capital necessary to the construction of the plant."

As the records of this Court show, similar contractual franchises have been granted across our country to solve the problem of furnishing utility service to our growing cities. See cases collected in *Russell* v. *Sebastian*, 233 U.S. 195, 204 (1914).

As characterized by this Court in *Frost* v. *Corporation Commission of the State of Oklahoma*, 278 U.S. 515, 519, 73 L.ed. 483, 487 (1929), such a right to furnish utility service "* * * is not a mere license, but a franchise, granted by the state *in consideration of the performance of a public service*; and as such it constitutes a property right within

the protection of the 14th Amendment." In order to raise the money necessary to construct the facilities for the initial central station power plant and for the distribution to the municipality as it expands, millions of dollars are necessarily borrowed on the faith of such franchises. See *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 65 (1913); *City of Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 663 (1912). The ability to make such loans is gravely jeopardized by this decision. If a state may break its solemn contracts after the other party to those contracts has performed them for many years, then the entire system of utility financing based upon long-range planning and orderly expansion of service under mortgages on contractual franchises will have been seriously impaired. Compare *Boise Artesian H. & C. Water Co.* v. *Boise City*, 230 U.S. 84, 91 (1913).

These franchises have been mortgaged on the public records since 1944 (Ex. 48, Vol. X, R. 1447, 1470) and in 1944 were claimed in the prospectus filed with the Securities and Exchange Commission (Ex. 49, Vol. X, R. 1459) as to the outstanding bonds secured by this mortgage. The error of the lower tribunals, from the standpoint of public policy, therefore is magnified by the erroneous refusal of the Commission to join as indispensable parties the Trustees under the deed of trust covering these franchises. *Thayer* v. *Life Association of America*, 112 U.S. 864, 865. See also *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 122; *Mississippi Power & Light Co.* v. *Coldwater*, D.C. Miss., 168 F. Supp. 463, 478. The rights of these trustees and their bondholders under these franchises have been effectively destroyed by the decision in a proceeding to which they were not even parties; and that filed with the Securities and Exchange Commission has thereby been retroactively rendered untrue.

For the foregoing reasons, we respectfully submit that jurisdiction exists in this Court to decide on appeal the substantial questions presented and that this Court should rectify the grave errors apparent in the record; but, if the proper remedy is by certiorari, then it is respectfully prayed for in accordance with law.

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CERTIFICATE OF SERVICE

I, Joshua Green, one of the attorneys for the Appellant herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served printed copies of the foregoing Jurisdictional Statement on the Appellee in the manner following:

By mailing 2 copies thereof in a duly addressed envelope, with postage prepaid, to T. Harvey Hedgepeth, Esquire, Deposit Guaranty National Bank Building, Jackson, Mississippi 39201.

I further certify that I have caused to be mailed, postage prepaid, forty (40) printed copies thereof to the Clerk, United States Supreme Court, Washington, D.C. 20520.

This the 16th day of September, 1969.

.....

JOSHUA GREEN
800 Electric Building
Jackson, Mississippi 39201
One of the Attorneys for Appellant

APPENDIX

APPENDIX A

[Key]

MISSISSIPPI POWER & LIGHT COMPANY,
a Mississippi Corporation

v.

CAPITAL ELECTRIC POWER
ASSOCIATION.

No. 45102.

Supreme Court of Mississippi.
April 21, 1969.

SMITH, Justice.

Mississippi Power & Light Company appeals from a decree of the Chancery Court of the First Judicial District of Hinds County affirming a "cease and desist" order entered against it by Mississippi Public Service Commission upon petition of appellee, Capital Electric Power Association.

Capital Electric's petition, filed October 4, 1960, charged Mississippi Power with having invaded its service area, previously certificated to Capital Electric by the Commission on September 21, 1959, under the provisions of Chapter 372, Mississippi Laws of 1956, by constructing, maintaining and operating electric lines and other facilities in the area and by serving and offering to serve customers therein.

The area in question lay west of the City of Jackson and became a part of that city on March 17, 1960, through extension of its municipal boundaries.

On October 27, 1960, Mississippi Power answered and filed a cross petition claiming the right to serve the area, the City of Jackson was permitted to intervene on Febru-

ary 7, 1961, and afterward various pleadings, motions and exhibits were filed by the several parties.

In substance, the position of Mississippi Power, as reflected by its pleadings, was that, while the area, prior to its annexation, had been certificated to Capital Electric with its consent, in consenting it had expressly reserved the right to serve this or any other territory which might afterward become annexed to the City of Jackson, wherein Mississippi Power held a franchise.

As stated, the boundaries of the City of Jackson were extended on March 17, 1960, so as to include the area in question and Mississippi Power claimed that its franchise was thereby extended to include it; and, moreover, asserted that it was entitled to "follow the customer" (the City of Jackson) into the added area.

By way of affirmative defenses, Mississippi Power pleaded, *inter alia*, its municipal franchise granted on May 26, 1956, and averred that Capital Electric had no municipal franchise. Mississippi Power also asserted a "grandfather" right to the added territory by virtue of its service within the City of Jackson as it existed on the effective date of 1956 Act and prior to the expansion of the municipal boundaries on March 17, 1960.

By cross petition Mississippi Power demanded that Capital Electric be required to discontinue serving the area certificated to it but which now lay within the expanded municipal boundaries of the City of Jackson. There followed several hearings, mostly involving questions relating to pleadings, and a period of relative quiescence.

At the time there were pending on appeal to this Court two cases presenting substantially analogous factual situations. Those two cases have since been decided and are sometimes referred to as the "Winona" case and the "Clin-

tion" case, in reference to the municipalities where they arose.

On February 11, 1963, this Court decided "*Winona*," reported as Delta Electric Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 482, 149 So.2d 504 (1963) and on March 11, 1963, decided "*Clinton*," reported as Capital Electric Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 514, 150 So.2d 534 (1963).

In both *Winona* and *Clinton*, Mississippi Power held municipal franchises and contended that, when the municipal boundaries were extended, their service area was likewise extended, even though such an extension encroached upon an area previously certificated to another utility. In both cases this contention was rejected by the Court.

Here, as in *Winona* and *Clinton*, Mississippi Power held a franchise to serve an area comprising a municipality, and as in *Winona* and *Clinton* there was an extension of the municipal boundaries so as to include within the municipality territory previously certificated to a power association. As in *Winona* and *Clinton*, Mississippi Power claims the right to serve that territory by reason of its incorporation into the municipality. Since the opinions in *Winona* and *Clinton* contain clear statements of the issues and of the Court's reasons for rejecting Mississippi Power's assertion of the right to serve the added territory, we will not repeat here what was said in those cases.

After the decisions in the *Winona* and *Clinton* cases were announced the Commission, considering that such decisions were controlling as to the issues, on motion, struck the answers of Mississippi Power and of the City of Jackson. Thereafter, however, with leave of the Commission, Mississippi Power filed an amended answer in which it brought forward its original contentions and also pled that

it had succeeded to the rights of Jackson Gas Light Company, under a corporate charter granted it by the Mississippi Legislature in 1860 and amended in 1888, as well as to those of Light, Heat and Water Company under a charter granted it in 1888. It pled certain rights granted it by the Board of Supervisors of Hinds County permitting use of highway and road rights-of-way for construction of power lines. Also pleaded were other matters which we consider it unnecessary to detail here. The City of Jackson filed no further answer and appears to have abandoned the case.

Mississippi Power's argument that its municipal franchises expand coextensively with municipal boundaries into areas previously certificated to another utility was rejected in both the *Winona* and *Clinton* cases.

Upon conclusion of the hearing, the Commission found, therefore, that the decisions in *Winona* and *Clinton* controlled and issued its cease and desist order against Mississippi Power as prayed by Capital Electric. Mississippi Power appealed to the Chancery Court of the First Judicial District of Hinds County where the Commission's order was affirmed.

Mississippi Power contends that this was error, that *Winona* and *Clinton* are not controlling, and that rights possessed as successor to Jackson Gas Light Company and Light, Heat and Water Company under the 1860 and 1888 charters distinguish this case.

In its brief filed with this Court, Mississippi Power now states that its "principal contention is that it holds nonexclusive, valid electric franchises covering the disputed area; and that these grants from the State are enforceable and constitutionally protected."

This contention is based upon an assertion that Mississippi Power is the lawful successor to Jackson Gas Light

Company and Light, Heat and Water Company, and is the owner of their respective franchises. This claim is supported by a deraignment of title attached to the brief. The validity of Mississippi Power's title is challenged by Capital Electric but for the purposes of this opinion it will be assumed that it is good.

The charter of Jackson Gas Light Company was granted by the Mississippi Legislature by Chapter CCXLIII, February 10, 1860. This act incorporated an existing gasworks located in the City of Jackson, Chapter 427, Mississippi Laws of 1888, amended the charter previously granted so as to authorize electric service as follows:

> SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the charter of the Jackson Gas Light Company be and the same is hereby amended as follows: The said Jackson Gas Light Company is fully authorized to construct, own and operate an electric light and power plant in the city of Jackson, in connection with the present gas plant; and it is fully authorized and empowered to erect poles along and through the streets and alleys of said city on which to suspend its wires, lamps and other appurtenances; *provided*, that nothing herein contained shall be construed as legalizing said company's occupation of a part of Market Square, if the same has not already been legalized.

Light, Heat and Water Company was incorporated under Chapter 424, Laws of Mississippi 1888, Section 3, of which is as follows:

> SEC. 3. Be it further enacted, That said company shall have power to own such lands and all such factories, reservoirs and mechanical devices or appliances as may be deemed proper by the directors of said company to conduct successfully said business and operate the franchises hereby conferred and to locate them at

points most advantageous to its business, and to manufacture and produce any and all kinds of artificial light and heat, whether made from fuel or power, electricity or otherwise; and to store and supply for public and private use water; and to sell such light, heat and water on such reasonable terms as said directors may from time to time establish, *in the city of Jackson and its suburbs*; and to own, use and operate all machinery, engines, conduits, wires, pipes and all appliances necessary or proper to the business of said company. That the right-of-way *over all the streets and alleys of the city of Jackson and the public roads adjacent thereto is hereby granted said company for its pipes, wires, poles and appliances for the purposes aforesaid*, and authority and right is hereby conferred on said company or its agents to dig the same, to lay their pipes beneath said streets and reads and to repair same, and to erect poles upon which to suspend their wires or lights, but such pipes and poles and wires must be so arranged that the use of said streets and roads as public highways shall not be materially impaired; that said company may buy, sell and deal in for profit, all the appliances to its said business and also do gas-fitting and plumbing for hire. (Emphasis added.)

There is little, if any, dispute as to the facts. In 1888 the disputed area lay west of the City of Jackson and was two miles from it at the nearest point. In 1921 this area was one mile distant at its nearest point. In 1925 the boundary of the City of Jackson had approached to within one-half mile. In 1949 the City expanded its boundaries so as to touch the area on the east side but did not include any part of it.

In 1915 the area was woodland and farmland. There was one residence either on or near the disputed area. There was one farm on it which later became a dairy farm. A part of the disputed area could be reached from Jackson in 1915 and for years afterward only by a dirt or "dry weather" road. In the 1920's and later, this road was almost

always impassable in winter. There was a swampy area and a creek which could hardly be crossed in the winter with a horse and buggy. Between this area and the City of Jackson was wooded, open country with a few little shanties. These conditions continued without significant change until U.S. Highway 80 was opened between 1938 and 1940. At that time some development began but the area was still one-half mile distant at its closest point from the City of Jackson.

In its brief, Mississippi Power concedes that Capital Electric has furnished the electric service in the disputed area since September, 1939, which was the earliest time that such service was furnished by anyone. Also, it is conceded that Capital Electric had 134 connected services prior to March 29, 1956; 73 additional connections between March 29, 1956, and the city expansion on March 17, 1960; and 34 connected from that date to July 28, 1964. It is also conceded by Mississippi Power that its own services in the disputed area were limited to 6 connections prior to March 29, 1956; none connected from that date to March 17, 1960; and, 19 connected from March 17, 1960 to July 28, 1964.

Mississippi Power contends; however, that the charters, granted by the Legislature in 1860 and 1888, to its predecessors, give it the right to serve the added territory. They assert that these charters constitute binding, irrevocable, contractual obligations of the State of Mississippi granting it the right to do so, and are within the protection of the nonimpairment of the obligation of contracts clause of the constitution, citing Southern Bell Telephone & Telegraph Company v. City of Meridian, 241 Miss. 678, 131 So.2d 666 (1961).

Southern Bell, supra, involved Chapter 38, Laws of Mississippi of 1886. In a preamble, the Legislature declared the purpose of the act: "AN ACT to encourage and

facilitate the construction of Telegraph, Telephone and other like lines in the State of Mississippi." The act was designed to induce telegraph and telephone companies to come into the State and extended an invitation to them to build lines along all public roads, streets and waters of the State, free of charge. At the time, the telegraph had come into general use; but the telephone had not been invented until 1876, and was a relatively new device. Southern Bell's predecessor had accepted the offer extended by the act and had built lines in the City of Meridian and elsewhere. In *Southern Bell, supra*, the Court held that the act contained a clear offer or invitation expressly predicated upon the proposition that companies accepting it might use the public ways free of charge, and that Southern Bell had accepted it. As a consequence, the Court said that Chapter 372, Mississippi Laws of 1956, Section 5(e), insofar as it required payment of rent for use of the streets, violated the nonimpairment clause of the Constitution because the offer and acceptance constituted a contract. We do not think that the charters of incorporation embody an offer such as that extended by the statute in *Southern Bell*, nor that there was a contract such as that found by the Court to exist in that case.

[1] In this case, the 1860 and 1888 Acts were for the single purpose of granting charters of incorporation and enumerating the powers of the corporations so chartered, by a method then in common use for that purpose. Moreover, while corporate charters possess contractual characteristics, they are to be strictly construed against the corporation.

Mississippi-Gulfport Compress & Warehouses, Inc. v. Public Service Commission, 189 Miss. 166, 177, 196 So. 793, 795 (1940) held:

> In the case of Williamson v. Gordon Heights Ry. Co., 8 Del.Ch. 192, 40 A. 933, 934, its rule is

thus stated: "There is no rule of construction more fixed and unyielding than that requiring strict construction of grants to corporations." That case approved this statement: "In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England."

In our own state this rule obtains as announced in Abby v. Billups, 35 Miss. 618 at page 630, 72 Am. Dec. 143.

Here the corporations organized and chartered were authorized in 1888 to manufacture and sell electric energy in the City of Jackson or in the City of Jackson and its suburbs." The disputed area then lay some two miles outside the city, was virtually inaccessible and unin-habited. It was not a part of the municipality nor can it be argued that it was a part of its suburbs. In any event neither Jackson Gas Light Company, Light, Heat and Water Company nor Mississippi Power & Light Company provided or attempted to provide, electric service to the area from 1888 to 1939, a period of 51 years. In 1939, Capital Electric began supplying the area with this service. Since 1939 and until the present dispute arose, Capital Electric has supplied the area with adequate electric service while Mississippi Power made no objection and installed only 6 scattered services.

[2-4] We are unable to attribute to the Legislature a purpose, in granting the 1860 and 1888 charters to place in limbo in perpetuity, as far as electric service was concerned, an area of indefinite extent surrounding the City of Jackson in every direction. The language of the 1888 Act "Jackson and its suburbs" does not warrant the assumption that there was a grant in perpetuity of an implied power to serve, when, as and if it chose to do so, a

territory which was neither a part of the City of Jackson, nor of its suburbs. If it might be assumed that a right to serve the area was implicit in the early charters it carried with it a corresponding obligation to provide service. If such was the case, neither Mississippi Power nor its predecessors made any attempt to fulfill that obligation for 51 years prior to 1939 when Capital Electric began providing the service. Moreover, it had made only 6 scattered connections from 1939 until the present dispute arose. If the right to serve the area ever existed under the charters, it was lost through abandonment, and Capital Electric was entitled to the "grandfather" certificate granted it by the Commission under the 1956 Act.

[5] Whatever effect the 1860 and 1888 charters may have had in placing unalterably and forever, the right to serve the "City of Jackson and its suburbs," in the two early corporations and their successors, the area now in dispute clearly was neither within the City of Jackson nor a part of its suburbs. The language and purposes of the charters do not permit any reasonable inference that it was within the contemplation of the Legislature that authority granted to serve an urban area described as "Jackson and its suburbs" would also include unsettled country land lying two miles away. Mississippi Power and its predecessors wholly failed to serve the area or to assert any right to do so following the grant of the charters in 1888. Since 1939 it has been adequately served by Capital Electric. These circumstances are persuasive upon the proposition that no such power under the charters was considered to have existed.

In the *Winona* case the Court said:

> On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a

right to receive for it a grandfather certificate. This was a valid exercise of the police power of the state. The municipal franchise and street lighting contract were not preexisting rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26(d) (scope of review). 250 Miss. at 511-512, 149 So.2d at 514.

[6] We are unable to accord a broader scope to the right claimed under the early corporate charters to serve the City of "Jackson and its suburbs" than is accorded to a similar grant to a utility under the 1956 Act. In neither case will the expansion of the area, whether it comprises a municipality and its suburbs or only the municipality itself, warrant an invasion of an area previously certificated to and being served adequately by another utility.

[7] It may be of interest to note that the early charters included heat, light and water service as well as electric service, although, of course, no right to provide water and gas service in the territory is involved here. We are unable to attribute to the Legislature in granting the 1860 and 1888 charters a purpose to preclude a subsequent grant of service rights for electric, gas or water service in any territory that might at any time thereafter be annexed to the City of Jackson, in perpetuity.

In Zeigler v. Zeigler, 174 Miss. 302, 310, 164 So. 768, 770 (1935) the Court said:

> In construing statutes, the chief desire of the courts is to reach the real intention of the Legislature,

and knowing this to adopt that interpretation which will meet the real meaning, though such interpretation may be beyond or within, wider or narrower, than the mere letter of the statute. Unthought of results must be avoided if possible, especially if injustice follows, and unwise purpose will not be imputed to the Legislature when a reasonable construction is possible. Kennington v. Hemingway, 101 Miss. 259, 57 So. 809, 39 L.R.A. (N.S.) 541, Ann.Cas. 1914B, 392; Leaf Hotel Corporation v. City of Hattiesburg, 168 Miss. 304, 150 So. 779; Canal Bank & Trust Co. v. Brewer, 147 Miss. 885, 113 So. 552, 114 So. 127; City of Holly Springs v. Marshall County, 104 Miss. 752, 61 So. 703; Gunter v. City of Jackson, 130 Miss. 637, 94 So. 844; Huber v. Freret, 138 Miss. 238, 103 So. 3.

The case of Capital Electric Power Ass'n v. Mississippi Power & Light Company, 240 Miss. 139, 150-151, 125 So. 2d 739, 743 (1961) was the first decision of this Court under the Act of 1956 and in it the Court said:

> It is clear from Chapter 372, Laws of 1956, that it was the intention of the legislature that facilities of one utility should not be duplicated in the same area * * * The manifest policy of the act is to prevent duplicating and overriding facilities and certificates. * * * An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear. (Emphasis added.)

[8] Finally, it is argued that because of its contract with the City of Jackson to provide street light and other services that it has the right to follow the customer into the added territory. In Capital Electric Power Ass'n v. Mississippi Power & Light Co., 218 So.2d 707 (Miss. 1969) this proposition was rejected.

We are of the opinion that the order of the Mississippi Public Service Commission, as affirmed by the chancellor, was amply supported by evidence, was in accord with the law of the case, and that the decree appealed from should be affirmed.

Affirmed.

ETHRIDGE, C. J., and RODGERS, BRADY and ROBERTSON, JJ., concur.

APPENDIX B

W. T. Horton
Chancellor, Division 1
Fifth Chancery Court District
of the
State of Mississippi
Jackson 39205

Flora Evans
Court Reporter
Tel: 354-3147
Area Code 601

Chancery Court Building
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20th October 1967

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Mr. Sherwood W. Wise
Electric Building
Jackson, Mississippi

Mr. T. Hickey Hedgepeth
Deposit Guaranty National Bank Building
Jackson, Mississippi

Re: Mississippi Power & Light Company v.
Capital Electric Power Association

Gentlemen:

It is my opinion that when the City of Jackson annexed its municipal limits wherein it included the disputed area, that being zoned under a valid franchise from the Public Service Commission to Capital Electric Power Association, the said disputed area was included subject to said franchise and did not affect in any way the rights of said Power Association to serve said disputed area.

I cannot reasonably construe the Act of 1888 to fix the territorial area for the Mississippi Power & Light Company. This being my firm judgment, I am of the opinion that the "Clinton" and "Winona" cases are then controlling in the case at bar.

The order of the Commission is affirmed, and a decree may be taken accordingly.

I enjoyed having you gentlemen in our court in this case. Your oral arguments and briefs were excellent.

Respectfully submitted,

W. T. Horton
Chancellor

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 86,779

MISSISSIPPI POWER & LIGHT COMPANY
Appellant

vs.

CAPITAL ELECTRIC POWER ASSOCIATION
Appellee

Final Decree

(Filed November 20, 1967)

This cause came on to be heard upon the appeal of Mississippi Power & Light Company from the final order of the Mississippi Public Service Commission, dated October 6, 1966 in Cause No. U-264, upon the docket of said Commission granting and allowing the petition of Capital Electric Power Association for a cease and desist order requiring Mississippi Power & Light Company to cease and desist furnishing electric distribution facilities and providing

electric service in a particularly described portion of Capital Electric Power Association's certificated service area allotted and granted unto it by said Commission in its Docket No. U-84 by order dated September 21, 1959, being a so-called "Grandfather Certificate" granted and issued under Section 3(b) of the Public Utility Act of 1956 (Chapter 372, Mississippi Laws of 1956, hereinafter referred to as the "Act"), said particularly described area being located in Hinds County and within the corporate limits of the city of Jackson, and requiring that said Mississippi Power & Light Company take down and remove the electric distribution facilities built by it in said particularly described area (there being excluded from the requirements of said order, however, those distribution facilities built and those services rendered by Mississippi Power & Light Company in said particularly described area prior to March 29, 1956, the effective date of the Act); said order also overruling plea of res judicata filed by said Mississippi Power & Light Company, and the court having heard and considered said appeal upon the record made before the Commission and filed herein and having read and considered the briefs of all parties and having heard and considered the oral arguments of counsel for all parties and having taken said appeal under advisement for the rendering of a decision after further and full consideration thereof, and the court having fully considered said appeal and being fully advised in the premises, from the entire record and applicable law makes the following findings and conclusions:

1. Appellant and appellee are each and both public utilities in the field of electricity under the provisions of the Act.

2. The court has full jurisdiction of the parties and subject matter of this appeal and is authorized to do and adjudicate all that is done and adjudicated herein.

3. The findings of the Commission in the order appealed from were made in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding and the basis of the Commission's conclusions as appears from said order. The action of the Commission in granting the order appealed from was not erroneous legally; was supported by more than substantial evidence, was not contrary to the weight of the evidence, was not in excess of the statutory authority or jurisdiction of the Commission; nor does it violate statutory or constitutional rights of appellant.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The aforesaid final order of the Mississippi Public Service Commission in its Docket No. U-364, dated October 6, 1964, be and the same is hereby adjudged to be supported by more than substantial evidence, not contrary to the weight of the evidence, not in excess of the statutory authority or jurisdiction of the Commission, not erroneous legally and not violative of statutory or constitutional rights of appellant, whether those claimed under Section X of Article I (against the impairment of the obligation of contracts) and Section 1 of Amendment XIV (against deprivation of property without due process of law) of the Constitution of the United States and Sections 14 and 16, Mississippi Constitution or other, and said order be and the same is hereby affirmed.

2. The opinion of the court in the form of a letter addressed to counsel for the parties, dated October 30, 1967, and filed herein on Nov. 20th, 1967, is hereby made a part of the record in this cause.

3. All costs in this cause are hereby assessed against appellant, for which let execution issue.

ORDERED, ADJUDGED AND DECREED, this November 20th 1967

Chancellor

Approved as to Form

Green, Green and Cheney

By /s/ Garner W. Green

Wise Carter and Child

By /s/ James K. Child, Jr.

Of Counsel for Appellant,

Mississippi Power & Light Company

APPENDIX C

MISSISSIPPI
PUBLIC SERVICE COMMISSION
JACKSON
U-864
CAPITAL ELECTRIC POWER ASSOCIATION
VS
MISSISSIPPI POWER & LIGHT COMPANY

In re: Petition for Cease and Desist Order Against Mississippi Power & Light Company from Rendering Service to Harlow's Boat Center, Approximately 800' of Single Phase Distribution Lines Along Lynch, Burch, Craft, Washington, Booker, McLean, Dewey and Gibralter Streets, Serving 30 Street Lights, 4300 Block of Lynch Street, Serving Campbell Construction Company

Cease and Desist Order

On October 4, 1966, Capital Electric Power Association filed its petition for a cease and desist order against Mississippi Power & Light Company, then a Florida corporation but authorized to do business in Mississippi, since in

corporated in Mississippi, alleging the said Mississippi Power & Light Company had violated the provisions of Chapter 372, Mississippi Laws of 1956, by constructing, maintaining and operating certain electric lines and other electric facilities in an area in Hinds County, Mississippi, heretofore certificated to petitioner, and by serving and offering to serve prospective customers and by rendering street lighting service to the City of Jackson, all within the area previously certificated to said petitioner.

On October 27, 1960, respondent, Mississippi Power & Light Company filed its answer to the petition and set up in said answer certain affirmative matters by way of defense. The answer also contained a cross petition seeking certain relief against the petitioner.

On December 14, 1960, the City of Jackson filed a petition for leave of the Commission to intervene as a party to this proceeding.

On January 4, 1961, petitioner, Capital Electric Power Association, filed its answer to the petition of City of Jackson for leave to intervene as a party.

On January 4, 1961, petitioner, Capital Electric Power Association, filed its response to the affirmative matters contained in the answer of respondent, Mississippi Power & Light Company, motion to strike part of the affirmative matter contained in the answer, its answer to the cross petition, a special demurrer, a general demurrer, a motion to strike part of cross petition, and a motion to strike the cross petition as a whole.

On February 1, 1961, after hearings, the Commission entered an order sustaining the special demurrer and granting the motion to strike parts of the cross petition, but overruling the general demurrer, the motion to strike part of the affirmative matter in the answer, and the motion to strike the cross petition as a whole.

On February 7, 1961, the Commission entered an order sustaining petition of the City of Jackson to intervene as a party.

On February 7, 1961, the Commission issued an order overruling a motion of Mississippi Power & Light Company to strike.

On February 7, 1961, the Commission issued an order overruling general demurrer to petition of City of Jackson and an order overruling motion to strike petition to intervene filed by the City of Jackson.

On February 24, 1961, the City of Jackson filed an answer to the petition of Capital Electric Power Association, and incorporated in its answer a cross petition.

At this point there ensued a period of time when this cause was inactive awaiting the outcome of two cases which had been previously heard and decided by the Commission, and were then on appeal to the Courts. These cases were later decided by the Supreme Court of Mississippi on the appeals and are reported as follows: *Delta Electric Power Association* v. *Missippi Power & Light Company, et al.*, Miss. , 149 So. 2d 504, and *Capital Electric Power Association* v. *Mississippi Power & Light Company, et al.*, Miss. , 150 So. 2d 534.

On May 28, 1963, petitioner, Capital Electric Power Association, filed its response to affirmative matters in the answer of the City of Jackson, answer to the cross petition, general demurrer to the cross petition, special demurrer to the cross petition, motion to strike answer, and motion to strike cross petition.

On June 13, 1963, Mississippi Power Company filed a motion for leave to appear amicus curiae.

On June 14, 1963, the Commission issued an order granting Mississippi Power Company leave to appear amicus curiae.

On June 19, 1963, petitioner, Capital Electric Power Association, filed additional pleadings as follows: (a) motion to strike answer of respondent, Mississippi Power & Light Company; (b) motion to reconsider general demurrer to cross petition of Mississippi Power & Light Company, withdraw order overruling general demurrer and entered order sustaining said demurrer; (c) motion to strike answer of City of Jackson, Mississippi, intervenor, and (d) motion for preliminary hearing on its general demurrer to cross petition of the City of Jackson, Mississippi, intervenor.

On June 21, 1963, respondent, Mississippi Power & Light Company, filed a petition for leave to amend and supplement its answer.

On July 30, 1963, petitioner, Capital Electric Power Association, filed its answer to petition of Mississippi Power & Light Company, for leave to amend its answer.

On April 22, 1964, the respondent, Mississippi Power & Light Company, filed a petition for leave to file second amendment and supplement to answer of Mississippi Power & Light Company.

On April 24, 1964, the Commission held a hearing on all preliminary matters for the purpose of settling the pleadings. The Commission entered the orders on April 24, 1964 as follows:

(a) Order sustaining motion of Capital Electric Power Association to strike answer of Mississippi Power & Light Company.

(b) Order sustaining motion of Capital Electric Power Association to reconsider general demurrer to cross petition of Mississippi Power & Light Company, withdraw order overruling said general demurrer, and enter order sustaining said general demurrer, and the order sustaining said motion withdrew the former order and sustained said general demurrer.

(c) Order allowing time within which respondent Mississippi Power & Light Company might file motion for permission to plead further in this cause, said order being made pursuant to motion of Mississippi Power & Light Company made in open hearing and allowing time to and including May 5, 1964 within which said respondent Mississippi Power & Light Company might file a motion seeking permission to plead further. This time was by order further extended to and including May 15, 1964.

On April 21, 1964, no officers or counsel of the City of Jackson being present at the said hearing, the Commission on its own motion continued the hearing insofar as the City of Jackson was concerned, until the next regular meeting of the Commission to be held on May 5, 1964 at which time no officers or counsel of the City of Jackson being present, the hearing was resumed and pursuant thereto orders were entered as follows:

(a) Order sustaining general demurrer to cross petition of City of Jackson, Mississippi intervenor.

(b) Order sustaining motion of Capital Electric Power Association to strike answer of the City of Jackson, Mississippi, intervenor.

(c) Order allowing additional time within which Mississippi Power & Light Company, respondent, may file motion for permission to plead further.

(d) Order allowing time within which the City of Jackson, Mississippi, intervenor, may file motion for permission to plead further herein.

On May 15, 1964, respondent, Mississippi Power & Light Company, filed its petition for leave to file amended answer; the proposed amended answer was annexed to the petition.

On June 17, 1964, petitioner, Capital Electric Power Association, answered said petition and on June 23, 1964, after hearing, an order was entered by the Commission allowing the filing of said amended answer.

On June 24, 1964, respondent, Mississippi Power & Light Company, filed its amended answer to petition for cease and desist order.

On July 24, 1964, petitioner, Capital Electric Power Association, filed its response to affirmative matter in the amended answer of respondent, Mississippi Power & Light Company.

After a number of previous hearings, the cause then came on to be heard on the merits on July 31, 1964, upon the original petition of Capital Electric Power Association for a cease and desist order and the amended answer of Mississippi Power & Light Company, at which time oral and documentary evidence was presented in open hearing, all parties being present in person and represented by counsel, except City of Jackson, intervenor. The hearing was recessed and by appropriate order was resumed on August 7, 1964.

During the hearing on the merits on July 31, 1964, respondent, Mississippi Power & Light Company, filed a pleading of "Plea of Res Adjudicata" and asked permission that this pleading be received and filed; petitioner, Capital

tion 7; thence East 10 mile to the NE corner of the SW¼ of the SE¼ of Section 6, T5N, R1E; the point of beginning and all being situated in Hinds County, Mississippi.

No appeal was prosecuted from the said order of September 21, 1959, in Docket No. U-84, granting the said certificate of convenience and necessity to Capital Electric Power Association, and the time for such an appeal has long since expired.

(3) That on March 29, 1950, and continuously since said date, the petitioner, Capital Electric Power Association, has been rendering reasonably adequate electric service within the area particularly described in the preceding paragraph.

(4) That on November 25, 1959, the respondent, Mississippi Power & Light Company, was granted a partial or interim certificate of convenience and necessity authorizing its continued operation as an electric public utility in certain counties in the State of Mississippi, including Hinds County. Said certificate was granted in Docket No. U-11 and no appeal has been taken from the grant of such certificate, although the time for such appeal has long since expired. Said partial certificate authorized Mississippi Power & Light Company to continue its operation in the City of Jackson and other areas of the State. This certificate described the area certificated by particular metes and bounds description, but the area included in said certificate did not encompass or include any part of the territory particularly described in paragraph (3) of the finding of fact by the Commission. At the time of the original certificate was granted Mississippi Power & Light Company the said particularly described area lay adjacent to but outside the corporate limits of the City of Jackson.

(5) That the corporate limits of the City of Jackson were enlarged or extended effective March 17, 1960, so as to include, among other areas, the area particularly described above, which will be referred to as the "disputed area". Since said date of March 17, 1960, the disputed area has been a part of the City of Jackson.

(6) That Chapter CCCXLIII, Mississippi Laws of 1860, granted unto Jackson Gas Light Company a charter of incorporation; and Chapter 427, Mississippi Laws of 1888 granted an amendment to said charter. Chapter 424, Mississippi Laws of 1888, granted unto Light, Heat and Water Company of Jackson a charter of incorporation.

(7) That on October 31, 1946, respondent, Mississippi Power & Light Company, entered into an agreement with the City of Jackson to provide electric service to the City's municipal pumping plant and respondent has provided that service since that date.

(8) That on September 22, 1950, respondent, Mississippi Power & Light Company, entered into a street lighting contract with City of Jackson and respondent has served street lighting requirements of the City of Jackson under said contract since that date.

(9) That on May 16, 1956, the City of Jackson granted unto respondent, Mississippi Power & Light Company a nonexclusive municipal franchise for the rendering of electric service for a period of twenty-five years, which will expire May 15, 1981. Provisions of the franchise purport to grant to Mississippi Power & Light Company the right to use and occupy in, under, over, along, upon and across all streets, alleys and ways, bridges and public places and other municipal property in said municipality as they then existed or as hereafter might be laid out or extended during the life of the franchise and for the purpose of extend-

ing its system beyond the limits of the municipality as they might then or thereafter exist for the purpose of conducting its electric utility business.

(10) That on January 3, 1928, the Board of Supervisors of Hinds County, Mississippi, granted unto respondent, Mississippi Power & Light Company, a nonexclusive franchise for a period of ninety-nine years to construct, own and operate a plant or plants and a system for the manufacture and distribution of electric current for all purposes within said county; and an easement for the erection of lines and other facilities on the rights of way of streets, alleys, bridges and other public places, provided such facilities were not to interfere with the proper use of such rights of way and public places.

(11) That on October 5, 1938, the Board of Supervisors of Hinds County, Mississippi, granted unto petitioner, Capital Electric Power Association, a franchise or easement to erect, construct, operate and maintain electric power lines for the distribution of electric energy along, upon, over and across the public highways of Hinds County, Mississippi, provided such lines were placed on said highways in such manner as not to interfere with the rights of the public in the use thereof.

(12) That on February 10, 1939, the Board of Supervisors of Hinds County, Mississippi, granted unto petitioner, Capital Electric Power Association, a franchise or easement to construct, maintain and operate electric power lines and other related facilities over and across all properties of said county over which the Board has jurisdiction, except the property on which the courthouses are located, including the right to trim trees, etc., provided power lines and other facilities should be located in such manner as to form the least possible interference with the proper and appropriate public use of said property.

(13) That petitioner, Capital Electric Power Association, provided the first electric service that was ever rendered in the disputed area in the year 1939. From that date to this date it has provided to the disputed area adequate and dependable electric service for all purposes and is able and willing to continue doing so in the future. It now has in the disputed area considerably more than 200 service locations, consisting of residential, commercial, industrial and miscellaneous other types of services.

(14) That prior to June, 1960, no other electric utility had ever at any time served any part of said disputed area except respondent, Mississippi Power & Light Company, had connected six miscellaneous widely scattered services therein, which services were "frozen" when said area was adjudicated as being grandfather service area of petitioner by the aforesaid order of September 21, 1959, in Docket U-84.

(15) That respondent, Mississippi Power & Light Company, has since June, 1960, built electric distribution facilities and provided services and offered to provide services in the disputed area as follows:

(a) Sometime in June, 1960, respondent extended its service line from its distribution line (which distribution line is located within its own certificated area under Docket No. U-44) to a temporary service pole located approximately 50 feet within the disputed area at 3051 Lynch Street and installed upon said temporary service pole a meter and from such facilities provided construction power for the construction of a business building owned by J. S. Barlow, Jr., and which was being erected to house the business of said owner to be known as "Barlow's Boat Center". Said construction service was provided by respondent from the time of installation in June, 1960 to August 16, 1960. On August 16, 1960, respondent removed said construction service fa-

cilities and constructed and installed a 3-phase quadruplex service line from its aforesaid distribution line to the side of the said building, installed its meter and connected permanent type 3-phase electric service to serve all of the requirements of said location of the said J. S. Barlow, Jr., doing business as Barlow's Boat Center. Said permanent type service so installed is located at a point approximately 100 feet within the disputed area.

(b) On or about September 2, 1960, respondent began the construction of single phase lines along Lynch, Craft, Burch, Washington, Booker, McLean, Dewey and Gibraltar Streets in said area, and by September 12, 1960, had completed approximately 4900 feet of such line and installed thereon 30 street lights. Said distribution lines duplicated at all points the distribution lines of petitioner, which were already in place and in operation on each and all of said streets and had been so in place and in operation since, on and prior to the effective date of the Act, March 29, 1956. All of this construction was within the disputed area.

(c) On or about September 29, 1960, at a location in the 3000 block of Lynch Street in said disputed area respondent connected service for Campbell Construction Company, a building contractor, for use in the construction of a building at that location.

(d) Respondent continued to build facilities, offer services and provide services which are summarized in Exhibit 3 in the evidence, resulting in services being rendered in the numbers, of the types, for the consumers and at the addresses as shown in said Exhibit 3, all within said disputed area.

(16) That Mississippi Power & Light Company, unless ordered to cease and desist therefrom, will offer and

render electric distribution service to customers and service locations within the disputed area, and will continue to render electric service to the customers now being served. It will also continue rendering street lighting services within the disputed area unless ordered to cease and desist therefrom.

(17) That a cease and desist order should be issued commanding and requiring Mississippi Power & Light Company to cease and desist from rendering electric service in the disputed area, including street lighting service. Such cease and desist order should also require Mississippi Power & Light Company to remove within a reasonable period of time all of its electrical facilities which it has constructed within the disputed area since the effective date of the Act, March 29, 1956.

From the foregoing statement of facts it is evident that the real issue in this controversy is whether or not the certificate of convenience and necessity issued by the Public Service Commission is entitled to be protected against the invasion of the certificated area by the construction and operation of electric facilities for the purpose of rendering service in said area by another electric utility which does not have a certificate to serve the disputed area.

We do not consider the above referred to laws granting corporate charters, the municipal franchise, street lighting contract, pumping plant contract or Hinds County franchises, to be germane to any of the issues in this cause. Therefore, we disregard them completely as we believe they have no bearing on this case. The Commission, however, does not decide on the validity of any of the acts of the Mississippi Legislature referred to granting of corporate charters, municipal franchise of the City of Jackson, Hinds County franchises, the street lighting contract

or pumping plant contract of the City of Jackson, nor attempt to interpret or construe any of their provisions. The Commission's decision is based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket No. U-44 and U-84. The first certificate does not include the disputed area. The second certificate does include the area in dispute.

The Supreme Court case of *Capital Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ....., 150 So. 2d 534, decided that a certificate of convenience and necessity granted a utility is a valuable right which can be protected in the Courts. In deciding the case, the Court held:

> "As stated by the Court in the opinion rendered in the Delta Electric Power Association case prior decisions interpreting the Public Utilities Act have established two propositions: (1) Awards by the Commission of 'grandfather' certificates under Section 5, are made on an area rather than a facility basis; and (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the Courts. Capital Electric Power Association v. Mississippi Power & Light Company, 240 Miss. 139, 125 So. 2d 739; Mississippi Power Company, et al. v. East Mississippi Electric Power Association and Public Service Commission, ... Miss. ....., 140 So. 2d 286."

The answer of respondent suggested that other persons should be made parties to this proceeding, but the Commission is of the opinion that none of them are necessary parties.

The Commission is of the opinion that the Plea of Res Adjudicata filed by respondent, July 31, 1964, is not well taken and should be overruled.

IT IS, THEREFORE, ORDERED that:

(1) The petition for cease and desist order filed by Capital Electric Power Association be and the same is hereby granted.

(2) Mississippi Power & Light Company be and it is hereby commanded, required and ordered to cease and desist from rendering any electric distribution service or street lighting services in the disputed area, other than the six scattered miscellaneous services which it was rendering in the disputed area on the effective date of the Act or such of them as continue to be active services.

(3) Mississippi Power & Light Company be and it is hereby commanded, required and ordered to remove all of its electric lines and facilities which it has constructed subsequent to the effective date of the Act, March 29, 1956, and is now operating or maintaining within the disputed area, within a period of thirty (30) days from the date of this order.

(4) The Plea of Res Adjudicata filed herein by Mississippi Power & Light Company be and the same is hereby overruled and denied.

(5) This order shall be and is effective from and after the date of its issuance.

ORDERED by the Commission this 6th day of October, 1964.

/s/ E. W. Robinson,
E. W. Robinson,
Executive Secretary

(Seal)

BES/et

CC: Mississippi Power & Light Company
Capital Electric Power Association
Hon. T. Harvey Hedgepeth
Hon. Sherwood W. Wise
Hon. Allen C. Thompson
Hon. E. W. Stennett
Hon. Garner W. Green

APPENDIX D

§ 7716-05. Certificate of public convenience and necessity; when required.

No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D (3) of section 1 [§ 7716-01], of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by

this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from

further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1 D (1) and 1 D (2) [§7716-01] and in the case of a utility defined in 1 D (3) [§7716-01] the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be en-

titled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise

granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 [this section] hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided, however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

In the case of a public utility as defined in section 1 D (3) [§7716-01] which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on

the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided.

SOURCES: Laws, 1956, ch. 372, §5.

APPENDIX E

Laws of Mississippi of 1860, Chapter CCCXLIII.
"AN ACT to incorporate the Jackson Gas Light Company.

"WHEREAS, gas works have been erected in the City of Jackson, and are now in successful operation, and whereas the owners of said gas works are desirous of forming a joint stock company.

Therefore.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, that William T. Withers, E. M. Yerger, and William A. Withers, and their successors, be and are hereby constituted a body politic and corporate, under the name of the 'Jackson Gas Light Company,' and as such may sue and be sued, plead and be impleaded, and have and exercise all the rights and privileges which are usual to corporations within the scope and design of its creation.

"Sec. 2. Be it further enacted, That said Jackson Gas Light Company be and is hereby authorized to acquire and hold such real estate as may be necessary for its own use and the conveyance from the mayor and aldermen for the City of Jackson, to William T. Withers, of one hundred and fifty, by one hundred and forty feet, square off of the north-west corner of square number nine south, in the City of Jackson, usually known as Market

or City Hall square, as a location for said gas works, be and the same is hereby approved and ratified.

"Sec. 3. Be it further enacted, That the capital stock of said company is hereby fixed at the sum of thirty-six thousand dollars, to be divided into shares of one hundred dollars each, and the board of president and directors hereinafter mentioned, shall cause certificates of stock to be issued to the stockholders, signed by the president, and countersigned by the secretary of the company, which shall be transferable only on the terms and conditions that may be imposed by the board of president and directors: The capital stock may be increased from time to time, at the option of the board of president and directors, to sixty thousand dollars, as additions to the gas works, or extensions of pipe may be made.

"Sec. 4. Be it further enacted, That the affairs of said gas light company shall be managed by a board composed of one president and two directors, who shall be elected by the stockholders of the company in the month of January, of each year, and shall hold their office for the term of one year from the date of their election, and until their successors are elected and enter on the discharge of the duties of their office: until an election is held, said E. M. Yerger shall act as president, and William T. Withers and William A. Withers, as directors of said gas light company; said board of president and directors, or a majority of them, shall make all needful rules and regulations for the management of said gas works, and fix the terms and conditions on which gas will be supplied to consumers.

"Sec. 5. Be it further enacted, That this act shall take effect and be in force from and after its passage.

"Approved, Feb. 10, 1880."

APPENDIX F

LAWS OF 1888, Chapter 427

AN ACT to Amend The Charter of the Jackson Gas Light Company.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the charter of the Jackson Gas Light Company be and the same is hereby amended as follows: The said Jackson Gas Light Company is fully authorized to construct, own and operate an electric light and power plant in the city of Jackson, in connection with the present gas plant; and it is fully authorized and empowered to erect poles along and through the streets and alleys of said city on which to suspend its wires, lamps and other appurtenances; provided, that nothing herein contained shall be construed as legalizing said company's occuaption of a part of Market Square, if the same has not already been legalized.

SECTION 2. Be it further enacted, That said company may also erect a fuel gas plant for supplying fuel gas through its present pipes, or through other pipes to be laid in and through the streets and alleys of said city; said fuel gas to be sold for fuel and other purposes in connection with incandescent gas burners.

SECTION 3. Be it further enacted, That said company is further empowered and authorized to buy, sell and generally deal in gas fixtures, gas pipes, gas burners, electric lamps, electric motors and all pipes and apparatus of any and all descriptions used in lighting by gas or electricity, or in supplying power or in supplying heat by means of gas or electricity; provided, it pays privilege taxes as other dealers.

SECTION 4. Be it further enacted, That said company is fully empowered and authorized to deal in and transact the business of plumbers, gas, steam and water-fitters, and deal in all such supplies.

SECTION 5. Be it further enacted, That this act take effect and be in force, from and after its passage.

Approved March 7, 1888.

APPENDIX G

"AN ACT to incorporate the Light, Heat and Water Company of Jackson, Mississippi.

"SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That P. W. Peeples, C. W. Robinson, R. L. Saunders, S. S. Carter, B. Lemly, I. Strauss, C. A. Lyerly, R. W. Millsaps, S. S. Calhoon and M. Green, their associates, successors and assigns, be and they are hereby made a body corporate under the name of the Light, Heat and Water Company of Jackson, Mississippi, with perpetual succession, and by that name may contract and be contracted with, sue and be sued, adopt a common seal and change the same at will, and do all other things necessary to the advantagous exercise of the franchises hereby conferred not inconsistent with the constitution of this State or of the United States.

"SEC. 2. Be it further enacted, That the capital stock of said company is one hundred thousand dollars, but the same may be increased or diminished at any regular meeting of the stockholders by a majority vote in value of the subscribed stock. That when, in the opinion of the corporators named herein, a sufficient amount of capital stock shall have been subscribed, upon the books of subscription opened by said corporators, to justify commencing business, said corporation may commence business.

"SEC. 3. Be it further enacted, That said company shall have power to own such lands and all such factories, reservoirs and mechanical devices or appliances as may be deemed proper by the directors of said company to conduct successfully said business and operate the franchises hereby conferred, and to locate them at points most advantageous to its business, and to manufacture and produce any and all kinds of artificial light and heat, whether made from fuel or power, electricity or otherwise; and to store and supply for public and private use water; and to sell such light, heat and water on such reasonable terms as said directors may from time to time establish, in the city of Jackson and its suburbs; and to own, use and operate all machinery, engines, conduits, wires, pipes and all appliances necessary or proper to the business of said company. That the right-of-way over all the streets and alleys of the city of Jackson and the public roads adjacent thereto is hereby granted said company for its pipes, wires, poles and appliances for the purposes aforesaid and authority and right is hereby conferred on said company or its agents to dig the same, to lay their pipes beneath said streets and roads and to repair same, and to erect poles upon which to suspend their wires or lights, but such pipes and poles and wires must be so arranged that the use of said streets and roads as public highways shall not be materially impaired; that said company may buy, sell and deal in for profit, all the appliances to its said business and also do gas-fitting and plumbing for hire.

"SEC. 4. Be it further enacted, That said company shall have all the powers set forth in the act entitled 'an act to extend the provisions of chapter 38 of the Code of 1880, in relation to corporations and other associations and for other purposes, approved March 7, 1882.

"SEC. 5. Be it further enacted, That said company hereby incorporated shall have power to purchase or lease

any property or appliances of any other company or person deemed necessary by said directors for the advantage of the business of this company and the exercise of the franchises hereby conferred, upon such terms as may be agreed upon by the contracting parties, and to consolidate with any other corporation created for cognate purposes, and power is hereby conferred upon the company hereby created as well as upon the other, selling, leasing or consolidating company or companies to make such sale, lease, or consolidation, with the company hereby created upon such terms as may be agreed upon, such agreement of sale, lease or consolidation to be recorded in the office of the clerk of the Chancery Court of Hines County, First District, in the records of deeds; that in case the said directors may desire to issue bonds, the pay for such property so acquired by sale, lease or consolidation, the company hereby created shall have full power and authority to execute and issue negotiable interest bearing bonds for the same and to secure them by a deed of trust, with power of sale, upon the property of the company hereby created.

"SEC. 6. Be it further enacted, That said company hereby created shall have power to charge and collect such reasonable rates for lights, heat and water as may be established from time to time by the directors.

"SEC. 7. Be it further enacted That if necessary, in the judgment of said directors, to place their water-mains, pipes or reservoirs, through or on private property, and the owner and the company cannot agree upon the value to be paid for its use, or if the owner is a minor or unknown or absent from the county, then power is hereby conferred upon said company to condemn such parts thereof as may be required by said company as provided by section 8 of the act approved March 10, 1852,

entitled 'an act to incorporate the Mississippi Central Railroad Company,' with all the rights and powers therein provided and upon payment or tender of the amount so ascertained to be the value thereof, to the owner, when known, or payment, to the clerk of the Chancery Court of Hinds County of said sum when the owner is unknown or absent, vest in fee simple in said company.

"SEC. 8. Be it further enacted, That this act take effect and be in force from and after its passage.

"Approved February 23, 1888."

SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 611

MISSISSIPPI POWER & LIGHT COMPANY,
Appellant,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS APPEAL

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 611

MISSISSIPPI POWER & LIGHT COMPANY,
Appellant,

vs,

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the following grounds:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

I. THE RECORD

By permission of the Supreme Court of Mississippi the original record in that court has been certified and sent up to this Court as the record on this appeal. The record is in 12 volumes, numbered I to XII, inclusive. In keeping with the rules of this Court and for convenience the record will be cited by volume and page, thus: "R. I, 1", meaning "Record, Volume I, page 1", etc.

NOTE: Inasmuch as the original record of the Mississippi Supreme Court is now on file in this Court (and was so filed before Appellee received a copy of the Jurisdictional Statement) and is not available to Appellee, it will be impossible for Appellee when referring to an exhibit herein to give "the page number at which the exhibit appears and at which it was offered in evidence" as required by Rule 40-2 of this Court; but the citation will show where the exhibit is found in the Record (taken from briefs in the State Court); and in all other respects citations to the Record will be in accordance with said Rule 40-2 of this Court.

II. APPENDICES

Appendices to the Jurisdictional Statement herein include copies of documents which are appropriately before the Court in this form and will not be duplicated in this motion. They will be referred to herein where appropriate. For convenience the reference will be "App. A., P. 1", meaning "Appellant's Appendix, Page 1", etc.

For reasons which will hereinafter appear copies of Sections 1, 4, 5, 6, 22, 26 and 28 of the Public Utility Act of 1956 (Chapter 372, Mississippi Laws of 1956; Section 7716-01, *et seq.*, Volume 6, Recompiled, Mississippi Code of 1942) constitute Appendix 1 hereto.

III. QUESTIONS PRESENTED

Appellant's statement of the questions presented is incomplete and misleading. It implies that Appellant built a system to operate and operates in the City of Jackson and its suburbs only; whereas Appellant built facilities to operate and operates in 46 of the 82 counties of the state. It also assumes that when under the Public Utility Act of 1956, Appendix 1 hereto, the State granted to Appellee an exclusive Certificate of Public Convenience and Necessity (based on prior service rights) to serve the area in suit it thereby "impaired" contract characteristics of corporate charters granted in 1860 and 1888 to which Appellant claims ownership at this time; and limits the question to the state's right to "impair".

A more accurate statement of the questions presented would be:

1. Whether the Certificate of Public Convenience and Necessity issued to Appellee by the State Public Service Commission September 21, 1959, under the provisions of the Public Utility Act of 1956 (which certificate carries exclusive service rights, except under some circumstances not relevant here) if sustained would have the effect of impairing contract characteristics of the charters of 1860 and 1888?

2. If so, was such impairment brought about by a permissible exercise of the police power of the State so that the protection of the impairment of contracts clause of the Federal Constitution would not be applicable thereto?

IV. STATEMENT OF THE CASE

1. Preliminary Statement

This case reached this Court by these steps: (1) Appellee, an electric utility, filed a petition for a cease and

desist order against Appellant, another electric utility, before the Mississippi Public Service Commission (Commission) alleging an unlawful invasion of Appellee's certificated service area by Appellant; (2) the Commission after hearing granted the cease and desist order; (3) Appellant appealed to the Chancery Court of Hinds County, Mississippi (Chancery Court), the intermediate court of appeals, and that Court affirmed; (4) Appellant appealed to the Supreme Court of Mississippi (Mississippi Court) and that Court affirmed; and (5) Appellant appealed to this Court on an alleged constitutional question.

2. The Act

Prior to enactment of the Public Utility Act of 1956, effective March 29, 1956 (Chapter 372, Mississippi Laws of 1956; Section 7716-01, *et seq.*, Volume 6, Recompiled, Mississippi Code of 1942), herein called the "Act", electric public utilities were not regulated by the Commission or any other state agency (although required to obtain municipal franchises to operate within municipalities). That Act brought them under the exclusive original jurisdiction of the Commission for regulation in respect of all of their "intrastate business and property" subject to certain exceptions not material here (Section 7716-04, Volume 6, Recompiled, Mississippi Code of 1942) (A. A1, A3).

The Act recognized prior service rights and granted unto each electric utility (as well as water, gas, telephone, etc., utilities) upon timely application being made and without proof that the public convenience and necessity would be served thereby the right to a Certificate of Public Convenience and Necessity (usually called a "grandfather certificate") to continue serving the areas being served by it on and prior to the effective date of the Act. These certificates were provided for on an *area* basis, not a facility basis.

3. Legal Status of Parties

Appellant and Appellee were each and both included in the definition of a "public utility" contained in the Act and each and both were made subject to the terms and provisions of the Act and the jurisdiction of the Commission (Sections 1 and 4 of the Act; A. A1, A3).

The parties may be further identified as follows:

1. Appellee is a corporation organized and operating under the Electric Power Association Act of Mississippi (Chapter 184, Mississippi Laws of 1936, as amended; Section 5463, *et seq.*, Volume 4A, Recompiled, Mississippi Code of 1942) and by the terms and provisions of said Act and its charter is vested with full, plenary and unrestricted authority to render electric service of every kind and character, residential, commercial, industrial and other, both within and without municipal and urban areas of all sizes.

2. At the commencement of litigation Appellant was a foreign corporation under the laws of the State of Florida but authorized to do business in Mississippi (has since obtained a Mississippi charter) and operates in an area located generally in the west half of the state. While its Florida charter is not in the record nor has its authority under the laws of Florida been established in the record it may be assumed for present purposes that at all relevant times its statutory and charter authority was and still is as broad as that of Appellee.

This identification is given in view of the fact that in various pleadings Appellant has implied that there is some sort of difference (favorable to Appellant) in the legal status, rights and public responsibilities of the two utilities. Such is not the case.

4. The Facts

The area in suit (disputed area) is a body of land in Hinds County, Mississippi, about one mile long east and west and three-fourths mile wide north and south. In 1888 it lay west of the City of Jackson about two miles at the nearest point, three miles at the farthest; in 1921 the closest part was one mile, the farthest two miles; in 1925 the closest point was one mile, the farthest one and one-half miles; in 1949 the City expanded and touched the east boundary of the area but did not take in any part of it, the farthest point still being one mile away; and on March 17, 1960, the City expanded and annexed the disputed area (and other areas roundabout) (R. VIII, 986, *et seq.*; Exh. 14 at 987).

In 1939 Appellee built lines into the disputed area (a rural area) and served three small residences, they being the only houses in the area at the time. It held itself out to the public as offering its services to all who desired them. It added facilities and rendered services as needed so that when the Act was adopted in 1956 it had 134 services in the area, and when the petition was filed October 4, 1960, it had more than 200 services therein (the area having developed with small residences and small commercial establishments) (Petition, R. I, 4, *et seq.*; App. A, 28).

Neither Appellant nor any other electric utility has ever served the disputed area or any part thereof (except for six scattered services around the edges connected by Appellant sometime before the Act was adopted in 1956 and which were "frozen" by agreement of the parties and the Commission's order of September 21, 1959, in Docket U-84, Appellee's "grandfather application", this being the method adopted by the Commission and applied in all cases

to deal with one or more "stray" services of a utility located in the "grandfather service area" of another utility, the predominant server of the area. (App. A. 24, 25, 28).

During the period 1956-1959 at the request of the Commission the two utilities set about to "identify" as best they could service areas to which they would be entitled respectively under their established rights, including rights under Section 5(b) of the Act, the so-called "grandfather clause". They were able to reach full agreement in this respect whereupon they made maps (by counties) identifying such areas, initialed the maps and filed them with the Commission. The pertinent map here was of Hinds County. That map identified the disputed area as an area to which Appellee had grandfather rights and both utilities recommended that the area be certificated to Appellee along with its other service areas in seven counties of the state.

The disputed area had been claimed by Appellee as grandfather service area in its application, Docket U-84. At first Appellant filed a sort of generalized protest on that cause (no particular or specific objection with respect to the disputed area) but that protest was later withdrawn and the disputed area was certificated to Appellee without objection under the Commission's order dated September 21, 1959.

Appellant obtained a "grandfather certificate" under its application to the Commission, Docket No. U-44, issued November 19, 1959, in which its certificated service area was, like that of Appellee, described by metes and bounds. It included all of the area in the City of Jackson and much territory roundabout which had been served by Appellant prior to adoption of the Act in 1956, but did not include any part of the disputed area.

Following annexation of the disputed area to the City of Jackson March 17, 1960, in May, 1960, Appellant built a line into the area and commenced rendering services. Other lines were built and other services rendered so that by July, 1964, Appellant had connected 19 services in the area (App. A. 7). By this time Appellee had approximately 241 services in the area (App. A. 7).

Appellant's lines duplicated at all points those of Appellee already in place (R. VI, 807, Exh. 1; R. I, 19, Exh. "A" to Petition).

Appellant did not obtain a Certificate of Public Convenience and Necessity from the Commission for such construction or services nor did it obtain the permission of Appellee.

The petition for cease and desist order ensued.

In the early stages Appellant did not plead the old charters of 1860 and 1888 in defense but relied on its municipal franchise and a water pumping agreement with the municipality to support its answer and cross petition (by which it sought to have Appellee remove all of its facilities and surrender the area to Appellant entirely). However, two state supreme court decisions rendered during the pendency of the cause (*Delta Electric Power Association v. Mississippi Power & Light Company*, 250 Miss. 482, 149 So. 2d 504 [1963] and *Capital Electric Power Association v. Mississippi Power & Light Company*, 250 Miss. 514, 150 So. 2d 534 [1963], on joint petition, cert. den. 375 U.S. 77; reh. den. 375 U.S. 981) rendered Appellant's answer and cross petition unavailing, and they were stricken.

Thereupon Appellant filed an amended answer and pleaded the old charters to support a claimed exclusive

right to serve the area; but later reduced its claim to a "joint" right with Appellee to serve in the area, this concession being made in briefs, not pleadings.

As aforesaid the Commission granted the Cease and Desist Order; the Chancery Court affirmed; and the State Supreme Court affirmed.

V. ARGUMENT

1. There Has Been No Impairment of the Obligations of a Contract

The charter of Jackson Gas Light Company was granted February 10, 1860 (R. V, 628, *et seq.*; App. A., P. 38, *et seq.*), simply incorporating existing "gas works" in Jackson, no authority being granted to engage in the electric business. The charter was amended March 7, 1888, to authorize electric service in Jackson (R. V, 630, *et seq.*; App. A., P. 40, *et seq.*). The amendment included an easement ". . . it is fully authorized and empowered to erect poles along and through the streets and alleys of said City on which to suspend its wires, lamps and other appurtenances, . . .".

The charter of Light, Heat and Water Company was granted February 23, 1888 (R. V, 632, *et seq.*; App. A., P. 41, *et seq.*), giving authority ". . . to sell such light . . . in the City of Jackson and its suburbs; . . ." and carried the easement provision "That the right-of-way over all of the streets and alleys of the City of Jackson, and the public roads adjacent thereto is hereby granted said company for its pipes, wires, poles and appliances for the purposes aforesaid . . .".

The Commission excluded the old charters from consideration altogether and the Mississippi Court affirmed. The Court was correct in doing so because:

(a) The said charters did not grant any rights whatever with respect to the disputed area which lay not within the City of Jackson or its suburbs but several miles away in purely rural area constituted of swamps, woodland, pastures and cultivated fields (and areas in between were of similar character).

(b) The Legislature in granting the said utilities operating rights in the City of Jackson in 1888 and by granting unto the City (by means of general statutes) authority from time to time to extend its corporate boundaries did not thereby divest itself of power and authority to grant rights to petitioner with respect to the disputed area at a time (1956) when it lay outside the municipality; and, the exercise by the City of the authority to extend its corporate limits in 1960 did not have the effect of canceling the rights granted by the Legislature to petitioner in 1956.

(c) Even if Appellant had acquired service rights in the disputed area in 1888 (which is certainly denied and respondent *doesn't even claim* any such rights except following extension of the corporate limits in 1960) those rights would have long since been abandoned and lost because Appellant not only did not serve the area but stood by and acquiesced in Appellee's serving it from 1939 to 1960, a period of 21 years, without protest or objection, and in so serving it, Appellee necessarily invested large sums in distribution facilities therein and acquired more than 200 valuable service contracts therein under circumstances and conditions justifying its belief that it would serve the area indefinitely.

(d) If in 1959, when the service area agreement was being worked out between Appellee and Appellant (three years of hard work went into this undertaking with fruitful results) Appellant had any shadow or color of right to serve

in the disputed area stemming from the old charters (which of course is denied), it was not because of the right to "sell such light . . . in the City of Jackson" for the area was not in the City of Jackson and never had been. Thus it would have had to have been because of the right to "sell such light . . . (in) . . . its suburbs." By *agreeing* that the area should be certificated to Appellee and in a *sworn* petition *representing such* to the Commission in Docket U-399 and by withdrawing its objections to Appellee's grandfather application, Docket U-84, and consenting that the area be certificated to Appellee, Appellant thereby unequivocally agreed that it had no such rights therein.

Whether this took the form of agreeing that it had never had any such rights stemming from said old charters (which seems manifestly to have been the case) or agreeing that any such right as it may ever have had had long since been abandoned while it stood silently by and acquiesced in Appellee's serving the area from 1939 to 1959 is immaterial. One is as effective as the other.

Taking these points then, one at a time, and developing them further:

1. As to "(a)" above, no one will deny that in 1888 the disputed area was not even near the City or its suburbs. The evidence on this is undisputed. It was provided by the testimony of: Professor F. M. Coleman, a hardy man in his mid-seventies who has resided in the vicinity of the disputed area from 1915 to date, was County Superintendent of Education in Hinds County from 1916 to 1936 and has had valuable farming interests in this general vicinity all of these years; Mr. Earl L. Phillips, Manager, Capital Electric Power Association from its organization in the late 1930's to date (a Hinds County planter earlier), who has known the area intimately since 1921, and Mr. W. W. Sikes,

an engineer who provided map exhibits and other data showing the western boundaries of the City of Jackson at various dates through the years and other technical information.

Such evidence may be briefly summarized as follows:

In *1888* the disputed area lay west from the City of Jackson two miles as to the closest part and about three miles as to the farthest; in *1921* as to the closest part it was one mile and as to the farthest, two miles; in *1925* as to the closest point it was one-half mile and as to the farthest, one and one-half miles; in *1949* the City expansion touched it on the east side but did not include any part of it, the farthest part thereof remaining one mile distant; and in *1960* the City expansion took in the disputed area (and other area roundabout) (R. VIII, 986, *et seq.*; Exh. 14, at 987).

As to the nature of the area: In *1915* it was woodland and farming land; there was one residence either within or near the disputed area facing the railroad; there was a farm in the disputed area which later became a dairy farm; the disputed area could be reached from Jackson as to only a part thereof by road in 1915 and for years afterward and then only by a "dry weather" dirt road; even into the 1920's and later the road was "nearly always" impassable in winter months; there was a swampy area and a creek which could hardly ever be crossed in winter with "horse and buggy"; people out in that general area usually came to Jackson on the train; between the disputed area and Jackson was wooded open country with just a few "little shanties" occupied as residences; this condition remained about the same until Highway 80 was cut through about 1938 and opened about 1940 whereupon some development began, but the area was still one-half mile at the

closest point and one and one-half miles at the farthest point away from the city limits for another ten years or so (Test. Coleman, R. IX, 1131-1136).

Turning to the testimony of Mr. Earl L. Phillips: In 1921 the disputed area and the area lying between it and the City of Jackson was wooded area, farm and pasture lands; there was no Highway 80 (it was not even roughed out until 1939); there were no roads other than a fair weather road, that is, a dirt road on the north side of the railroad which turned north and crossed a creek on the way to town and there was something of "a trail" leading westerly from Campbell College but to what and how far is not shown; there were one or two small houses between the disputed area and Campbell College (then a one building school in a rural area), a distance of one and one-half miles; the only other buildings either in the disputed area or between it and Jackson were two farmhouses, only one of them being in the disputed area. Between that time and 1939 there were three shacks built "back in the field" in the disputed area; they were served by petitioner in 1939 and one of the farmhouses was served in 1940; after Highway 80 was opened about 1940, the disputed area began slowly to develop primarily as a residential area (Test. Phillips, R. VII, 974-980).

As to the testimony of Mr. Sikes: As already stated, his was engineering work and the distances, etc., set out above were obtained from his work.

The foregoing evidence is undisputed. It is apparent before even referring to a definition of "suburbs" that we have no problem about suburbs. As Professor Coleman said when learned and adroit counsel opposite, on cross-examination, tried to get him to concede that he lived in Jackson's suburbs:

Q "You considered that you lived in Jackson?"

A "No, sir."

Q "Or in its suburbs?"

A "No, sir. When I moved out there I was completely, distinctly separated from Jackson. I didn't ever dream that I would live in Jackson."

Q "You just shopped in Jackson?"

A "That's right. . . ." (R. IX, 1138).

It is apparent that the disputed area was not a "suburb" of the City of Jackson at any relevant time. The authorities are well summarized in cases cited below.

Webster's New International Dictionary, Second Edition, defines "suburb" thus:

"1. An outlying part of a city or town; a smaller place adjacent to a city. In *pl.* with *the*, the residential region or districts on the outskirts of any city or large town; as, to live in, or have branch stores in, the *suburbs*.

"2. *pl.* The confines; the periphery; the environs."

The discussion of the term "suburbs" contained in the case of *Holguin v. Villalobos*, Tex. Civ. App., 212 S.W. 2d 498 (1947), is very enlightening. That case involved a suit by Villalobos against Holguin and others to enjoin the defendants from the continued operation of any motor vehicle transporting passengers for hire over any public highway between the city limits of the city of El Paso and the towns of Ysleta, Socorro, San Elizario and Clint, Texas, and all points in between, until and unless the defendants should procure a Certificate of Convenience and Necessity from the Railroad Commission of Texas. The plaintiff was, and had been for many years, the owner of a Motor Bus Certificate of Convenience and Necessity to operate a bus line between the city and towns named. The defendants defended on the ground that they were

operating a taxicab service wholly within the corporate limits of the City of El Paso *and the suburbs thereof* and thus were not subject to regulation by the Railroad Commission, inasmuch as they came within the exception provided in Section 1(c), Article 911a, Vernon's Civil Statutes, to wit:

> "... provided further, that the term 'Motor Bus Company' as used in this Act shall not include corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever; insofar as they own, control, operate, or manage motor propelled passenger vehicles operated wholly within the limits of any incorporated town or city, *and the suburbs thereof*, whether separately incorporated or otherwise." (Emphasis added).

The only "special issue" (a statutory mode of procedure in Texas) before the jury in the trial court was whether "the defendants operate their motor propelled vehicles wholly within the limits of the City of El Paso, Texas, and the suburbs thereof?" To this issue the jury answered "No"—meaning the operation extended beyond suburbs—and the court permanently enjoined the defendants from operating between the city limits of the City of El Paso and the other points mentioned.

In its opinion affirming the trial court's judgment, the Court of Civil Appeals stated in part as follows:

> "Webster's New International Dictionary defines a suburb to be:
>
> "'An outlying part of a city or town; a smaller place adjacent to a city.'
>
> "This meaning seems to be well and commonly understood. The City of El Paso, like any other city or town, is comprised of the urban inhabitants of one area within, or within and without the corporate limits. If the inhabitants of a larger municipality ex-

tend themselves so as to join up with, or make an adjoiner with, a smaller community whether incorporated or not the latter is said to be a suburb of the former, as is also the urban territory adjacent to an incorporated town or city. Under such definition and understanding communities separated by rural farming areas cannot be suburbs one of the other. The Supreme Court long ago attached much meaning to a town or city, saying the term carries with it the idea of a considerable aggregation of people living in close proximity. A town population is distinguished from a rural population, which is understood to signify a people scattered over the country, and engaged in agricultural pursuits, or some similar avocations, requiring a considerable territory for its support. A section of country so inhabited cannot be called a town, nor treated as a part of a town, without doing violence to the meaning ordinarily attached to that word. State ex rel. v. Edison, 76 Tex. 302, 13 S.W. 263, 264, 7 L.R.A. 733. To the same substantial effect is the language found in the City of Denver v. Coulehan, 20 Colo. 471, 39 P. 425, 27 L.R.A. 751; the legal as well as the popular idea of a town or city in this country both by name and use is that of oneness, community, locality, vicinity; a collective body, not several bodies; collective body of inhabitants; that is, a body of people collected or gathered in one mass, not separated into distinct masses, and having a community of interests; because residents of the same place, not different places. So as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or continuity, not separation or segregation. So, we conclude the outlying towns and communities from necessity and common understanding cannot be suburbs or parts of the City of El Paso but are separate and apart from it."

The Court of Civil Appeals subsequently granted a motion for rehearing, set aside its judgment and reversed and remanded the case for the sole reason that the trial court's judgment restricted the defendant to operating

within the city limits of El Paso regardless of whether any of the highways in question ran through any suburbs of that city, but its latter decision in nowise altered the portion of its opinion quoted above.

On the appeal of that case (*Villalobos v. Holguin*, 146 Tex. 474, 208 S.W. 2d 871 [1948]), the Supreme Court of Texas concurred with the trial court and the Court of Civil Appeals that the towns mentioned and the areas in between were not suburbs of the city of El Paso, and in its opinion used the following language:

> "There has been much controversy in this case as to the meaning of 'suburbs' as used in Sec. 1(c) [Art. 911a, Vernon's Civil Statutes]. Respondents argue that since they have a taxi license from the City of El Paso, they can lawfully operate from El Paso to Ysleta, Socorro, San Elizario and Clint and through all the territory between those villages because all those areas are suburbs of El Paso. We overrule that contention.
>
> "One authority holds that since the statute does not define suburbs, the courts are left to give the word its 'usual, familiar, and generally understood meaning, as used in everyday life'. Then it points out that the use of the word in our statutes is not new, for we have it used and well defined and understood in urban homesteads and other laws, and defines the term as *an outlying part of a city or town, a smaller place adjacent to a city*. Wood v. Del Rio Motor Transp. Co. et al., Tex. Civ. App., 27 S.W. 2d 874, 875, 876. *A suburb of a city is an outlying part of it, which may be used for business or for residential purposes or for both*. Rowland v. City of Greencastle, 151 Ind. 591, 362 N.E. 474. It is an outlying district which is adjacent to the city and convenient for use as a place of residence for those who work in the city. Piedmont Cotton Mills v. Georgia Ry. & Electric Co., 141 Ga. 129, 62 S.E. 52, 60 C.J., p. 982. *The word 'suburbs' signifies the outskirts of a city to live in or have branch stores*,

in Webster's New International Dictionary, 2d Ed. The testimony shows that the areas between Ysleta, Socorro, San Elizario and Clint consist of farm lands and that there are a number of small farms and a few large ones in the area between Ysleta and El Paso. Under those circumstances we have no difficulty in reaching the conclusion that Ysleta, Socorro, San Elizario and Clint and the territories between those villages are not suburbs of El Paso. We conclude also that as respondents operate out of El Paso toward Ysleta the suburbs of El Paso end where the first farms begin. When they reach farms they find a rural population, which is understood to signify a people scattered over the country, and engaged in agricultural pursuits, or some similar avocations, requiring a considerable area of territory for its support. A section of country so inhabited cannot be called a town, nor treated as part of a town, without doing violence to the meaning ordinarily attached to that word." (Italics ours) State v. Edison et al, 76 Tex. 302, 13 S.W. 263, 264, 7 L.R.A. 743." (Emphasis added)

Accord: *Reddit v. Nueces Transportation Co.*, 224 S.W. 2d 290 (Court of Civil Appeals, Texas, 1949).

Quite obviously, the disputed area which was undeveloped, and the undeveloped lands lying between it and the City of Jackson in the instant case were less likely to be considered "suburbs" of the City of Jackson than the areas in the *Villalobos* case were to be considered "suburbs" of the City of El Paso.

2. As to "(b)" above: In 1888, the Legislature granted a charter to Light, Heat, and Water Company to manufacture "artificial light and heat," and to sell the same "in the City of Jackson and its suburbs." After the lapse of 51 years (1888-1939), the disputed area remained as it had always been, purely rural and somewhat wild territory located several miles west from the City of Jackson with no electric service whatever and the area

between the City of Jackson and the disputed area was of similar character; there being located therein in 1939 three "shacks", they were served with electricity by Appellee in that year, the next year, 1940, a dairy farm was served from then on, although development was not rapid at first, all who asked for service were served, by 1956 the area had been substantially developed, Appellee having therein approximately 434 services (R. VII, 822-827); in 1956, the Act was passed by the Legislature, Section 3(b)1, the grandfather clause, granting unto the utility then serving the area the right to a certificate to continue serving it—the right of service being exclusive except under certain circumstances not present here. Appellant does not deny that Appellee was serving the area fully and exclusively on that date, and, of course, Appellee with Appellant's consent received a certificate to continue serving it.

Did the Legislature thereby exceed its authority? It did, not only as Appellee's certificate in Docket U-34 covering this and many other areas around the City of Jackson is difficulty, but so are the gas certificates and the water certificates which the Commission has issued to various utilities pursuant to the Act—the old charter, including heat and water as well as "light". Not only so, but all electric, gas and water certificates which may now or hereafter be issued and outstanding in any territory which might ever in the future be annexed to the City of Jackson would be in equal difficulty.

In other words, if Appellant's position should be sustained it would mean that from and after 1888 the Legislature has been, still is and will always be precluded from granting service rights or providing for services of electric, gas or water utilities in any territory that might from and after 1888 at any time, forever, be annexed to the

City of Jackson. If it attempted to do so, no such utility could safely invest its funds to serve such territory lest at any time the corporate limits be extended and the legislative grant be rendered void, or its exclusivity characteristic emasculated.

Manifestly such is not the law. The Legislature in granting a charter in 1888 to a utility to operate in the City of Jackson and its suburbs did not surrender the State's police power to provide for and regulate utility operations in all other areas of the State and to grant rights to utilities in doing so; and the 1956 Act in all of its parts is an exercise of the State's police power.

In *Delta Electric Power Association v. Mississippi Power & Light Company*, supra (119 So. 2d at 514), the Mississippi Court said:

> "On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise of the *police power* of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit because *before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area.* There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26(d) (scope of review)." (Emphasis added) cert. den. 375 U.S. 77, reh. den. 375 U.S. 961.

It may be said with equal force that on the effective date of the Act and before Light, Heat and Water Company (or its successor in interest) had acquired any serv-

ive rights whatever in the disputed area and after it had stood by and acquiesced in the area being served for 21 years by Appellee the Legislature by the said Act vested in Appellee the right to receive for it a grandfather certificate. And it could be said also with equal propriety "This was a valid exercise of the police power of the State."

It will be remembered that Appellant at no time claimed any right (or responsibility) to serve the area until it was annexed to the City of Jackson in 1960, and its claimed rights were bottomed upon the annexation. Indeed, Appellant freely admitted and agreed at all times prior thereto that Appellee had the right (and responsibility) to serve the area and to receive a certificate therefor, undertaking only to reserve any rights which might accrue to Appellant by virtue of annexation should the area be annexed to the municipality, and even this was a general reservation in a memorandum of agreement relating to all territory outside municipalities anywhere, not something specifically relating to the disputed area.

In *Delta Electric Power Association v. Mississippi Power & Light Company*, supra, before the annexation occurred the State had by the Act conferred service rights upon Delta, and in the instant case, before annexation occurred the State had by the Act conferred service rights upon Appellee (and Appellee had acquired such rights by prescription as well).

The State granted unto Light, Heat and Water Company such as it received under the 1888 charter, the State granted unto Appellee such as it received under the Act of 1956, and in the exercise of the police power in 1958 with respect to the disputed area, the State did not impinge upon what it had previously granted unto Light, Heat and

Water Company. The City of Jackson had no power to change this by annexing the disputed area in 1960.

For the Mississippi Court to have held otherwise would have required holding the Act of 1956 to be unconstitutional in respect of all territory, however distant, which may ever at any time be added to the City of Jackson—as regards not only electricity but manifestly gas and water as well; and, had it so held as to the City of Jackson, next in line would have been all territories roundabout all of the other older cities and towns throughout the State, for it is simple history judicially noticed that all charters for "light, heat and water" utilities were granted by legislative enactments in the old days (there being no general statute under which they might be chartered); and it is certain there were other charters issued in the old days to serve in the "municipality and its suburbs". Thus such a holding would have made a shambles of the Act.

It is apparent that no such effect was intended by the Legislature in the granting of corporate charters for utilities in the old days. It is equally apparent that no such strained construction carrying with it such unforeseen, unforeseeable, and unthought of consequence should have been adopted by the Mississippi Court.

All statutes will be construed in such way as to give effect to the true legislative intent and, to avoid imputing to the Legislature the bringing about of unreasonable, inequitable or unthought of results, and so important is this rule to the public interest that it need be the courts will actually "go beyond the letter of the statute" to give the rule effect, and if this be true as to statutes having general application it would be true a fortiori of statutes granting corporate charters where the selfish interests of the corporate entity could thereafter be pitted against the public interest, as is the case here. Certainly no court will im-

pute to the Legislature the intent to tie its own hands in the granting of charters in 1860 or 1888 so that it would not in later years be able to act in the public interest in providing for public utility services and the regulation thereof in vast areas surrounding and even remote from the cities in which such utilities were to operate.

In *Alexander v. Graves*, 178 Miss. 583, 173 So. 417 (1937), the Court emphasized the Legislative intent as being the "pole star" of guidance in construing statutes and said:

> "In construing statutes, the Court desires to reach a conclusion in harmony with the *intent* and *purpose* of the Legislature, and if the Legislature acts within constitutional limits, the Court will give effect to its statutes, according to the terms and intendment of the Legislature, ascertained according to recognized rules of statutory construction. Maris v. Lindsey, [illegible] Miss. 742, 87 So. 13. Where the meaning of a statute is not plain, resort must be had to the *real purpose* and intention of the Legislature in adopting it, which, when ascertained, should be given effect by the Court. Hamner v. Yazoo Delta Lumber Company, 100 Miss. 349, 56 So. 496." (Emphasis added.)

Accord: *State Highway Commission v. Cochran County*, 203 Miss. 629, 32 So. 2d 555 (Miss. 1947).

In *Zeigler v. Zeigler*, 174 Miss. 302, 164 So. 768 (1936), the same point was made and emphasis was laid upon the angle that statutes would be construed so as to avoid, if possible, unjust and unthought of results—and certainly if the Legislature in 1888 by granting one corporate charter tied its hands so it could not act in the public interest 68 years later in 1956, as to territory not touched by the earlier charter, this would be unjust and unthought of results—the Court saying:

"In construing statutes, the chief desire of the courts is to reach the *real intention* of the Legislature, and knowing this, to adopt that interpretation which will meet the real meaning, although such interpretation may be beyond, or within, wider or narrower, than the mere letter of the statute. *Unthought of results* must be avoided, if possible, *especially if injustice follows* and unwise purpose will not be imputed to the Legislature when a reasonable construction is possible (citing cases)." (Emphasis added).

Accord: *Sheffield v. Reece*, 201 Miss. 131, 28 So. 2d 745 (1947); *Gambrell v. Gulf States Creosoting Company*, 216 Miss. 505, 62 So. 2d 772 (1953).

It is submitted that there are no provisions in the old 1860 and 1888 charter enactments, whether "acted upon" or not acted upon, which would appear to make those acts form a constitutional pitfall for the Act of 1956, but even if there were the true intent and purposes of those acts would be given effect—merely the chartering of corporations for the rendering of utility services in Jackson and its suburbs—and they would pose no constitutional problem in respect of the legislative enactment of 1956 as it affects the disputed area.

3. As to "(c)" above, enough is said above to abundantly establish that even if Appellant had acquired service rights to the disputed area in 1888 (which of course is denied) it doesn't even claim that any such right arose in its favor until the area was annexed to the municipality in 1960; it certainly abandoned any such rights by (a) going for 72 years (1888-1960) without serving the area, (b) during 21 of those years (1939-1960) standing silently by and acquiescing in Appellee's service of the area, including the making of large investments in facilities therein and serving more than 200 consumers therein, (c) agreeing in 1950 before grandfather certificates were

issued in Dockets U-44 and U-84 that the area belonged to and should be certificated to Appellee, and (d) in Docket U-84, Appellee's grandfather application, withdrawing all objections and consenting to the area being certificated to Appellee.

Here the abandonment is so clear and complete as to admit of no doubt whatever, it being shown both "negatively" by failure to act and acquiescence, and "affirmatively" by agreeing that the area should be certificated to Appellee. The abandonment actually took place without Appellant's ever having taken possession of the right of one existed, which is denied; so the right was never actually "vested." In any event, if there had been such a right it was so completely abandoned that we merely cite our authorities and forego quoting from them. 1 Am Jur 2d, *Abandoned, Lost, and Unclaimed Property*, Sections 14 and 16; 1 C.J.S., *Abandonment*, Section 2a; *Krohn v. L. N. Dantzler Lumber Company*, 208 Miss. 691, 45 So 2d 276 (1950); *Columbus & Greenville Railway Company v. Dunn*, 184 Miss. 706, 185 So. 583 (1939) (and authorities cited therein).

Actually, Appellant admits and could not deny abandonment in that it claimed no right whatever to serve the disputed area but freely agreed that Appellee was entitled to serve it until March 17, 1960, the date the area was annexed to the municipality and then claimed service rights only under its municipal franchise and street lighting and water pumping agreements. It was not until that claim failed under the decisions in the cases of *Delta Electric Power Association v. Mississippi Power & Light Company* and *Capital Electric Power Association v. Mississippi Power & Light Company*, both supra, in 1963 that it even occurred to Appellant that it might claim rights under the old charters.

4. As to "(d)" above, if in 1950 when the Act was adopted, or in 1951 when the two utilities agreed that the disputed area should be certificated to Appellee in Docket U-84, Appellant had any claim of right to serve said area it was not because of its right to sell light in the City of Jackson, for the area was not within the City and never had been, thus any such claim would of necessity have had to stem from its license to sell light in the suburbs of Jackson. By agreeing that the area belonged to Appellee, and so representing to the Commission, and by withdrawing its protest altogether in Docket U-84 and taking no appeal from the final order thereon (by which the area was certificated to Appellee) Appellant has unquestionably and irrevocably agreed that it had no such service rights stemming from the "suburbs".

It should be noted here for emphasis that on August 12, 1950, the two utilities executed an agreement (R. 81 [sic] et seq.) stating inter alia:

> "Attached hereto in a part hereof are maps of Copiah, Hinds, Madison, Rankin and Warren Counties. Shown thereon are boundary lines defining the respective areas of the parties as agreed upon. Each of the maps have been initialed by the parties to the signatures hereto. Proper orders to be approved by the parties shall be entered on the minutes of the Public Service Commission." (Emphasis added.)

On August 16, 1950, there was a supplemental agreement (R. 81 [sic] et seq.) reciting:

> "The parties hereto are in the process of settling certain differences which have heretofore existed between them as to facilities, service areas and customers under the direction and supervision of the Mississippi Public Service Commission. That while the working out of these matters is in process it is deemed advisable between the parties hereto that certain facilities and customers be exchanged." (Emphasis added.)

On March 20, 1959, the two utilities filed a joint petition in Docket U-399 for exchange of facilities, etc., and in a final order entered therein June 4, 1959, the Commission found that both utilities had filed grandfather applications, Dockets U-44 and U-84, that other proceedings were pending involving controversies between the two utilities, and:

> "... that in connection with and as a part of said agreement between the company and the association for the exchange of properties and customers, that said parties should be, and are, hereby authorized to dispose of *all pending controversies* between them on the docket of this Commission *as a part of the agreement* in this case by separate order in each instance therefor. ..." (Emphasis added) (R. XI, 1580).

In due course, Appellee withdrew its protest in Appellant's grandfather application proceeding, Docket U-44 (R. X, 1519), and Appellant withdrew its protest and objection in Appellee's grandfather application proceeding, Docket U-84 (R. VII, 850). In the final order in Docket U-84 the Commission expressly found:

> "That the objection to the grant of this certificate which was filed by Mississippi Power & Light Company on September 28, 1956, has now been *fully* resolved to the *mutual satisfaction* of both the applicant and the objector so that said Mississippi Power & Light Company now *interposes no objection* to the grant of this certificate." (Emphasis added)

And, of course, the disputed area was included by metes and bounds description in that certificate to petitioner.

It is therefore submitted that from no possible viewpoint could the old charters afford respondent any defense, the Commission acted correctly in excluding them from consideration altogether, and the Mississippi Court correctly affirmed.

2. Holdings of Mississippi Court:

The Mississippi Court in its opinion not yet officially reported but unofficially reported as *Mississippi Power & Light Company v. Capital Electric Power Association*, 222 So. 2d 399 (Miss., April 21, 1969) (App. A 1, *et seq.*) sustained each of the propositions set forth under "(a)" through "(d)" above. As to "(a)", see page 404; as to "(b)", pages 404, 405; as to "(c)", page 404; as to "(d)", page 404.

It then concluded:

> "We are unable to accord a broader scope to the right claimed under the early corporate charters to serve the City of Jackson and its suburbs than is accorded to a similar grant to a utility under the 1956 Act. In neither case will the expansion of the area, whether it comprises a municipality and its suburbs or only the municipality itself, warrant an invasion of an area previously certificated to and being served adequately by another utility."

This conclusion was reached by the application of elementary and universally accepted rules of construction of legislative enactments, such rules being alluded to by the Court with ample citations of authority.

That Court thus concluded that neither the old charters themselves, nor the doing of business by the corporations under them, nor both, created any contractual obligation or covenant on the part of the state that Appellant should have the privilege or right to provide electric service in the disputed area either at the time the charters were granted or later. And this, of course, is another way of saying that the state did not breach any contractual obligation to Appellant when it adopted the 1956 Act under the terms of which Appellee was, on the basis of prior service, granted the right to a certificate to the area, not

3. This Court Will Accept the Mississippi Court's Interpretation of Mississippi Legislative Enactments, Including Legislative Charters

pellant charter authority to sell "light, heat and water" in the City of Jackson and its suburbs as the City then existed (including of course the easement for use of the streets and roads); that such suburbs did not include the disputed area (this being a determination of fact based on undisputed evidence); and without deciding or attempting to decide every possible case which could or might have arisen in the interim between the granting of the charters in 1888 and the adoption of the Act in 1956 expressly held that the legislature did not intend to grant and did not grant authority for Appellant acting under such charters to invade the certificated service area of another utility unto which certificated service rights were granted under the 1956 Act covering area not within the City of Jackson or its suburbs when the charters were granted nor when (in 1939) the area was first served by the present certificate holder, Appellee.

This Court will accept that interpretation.

In *3 Cyclopedia of Federal Procedure*, 3rd Ed., Section 6.14, pages 183-186, it is said:

> "State decisions establishing state law constitute the rule of decision where they are applicable to matters in civil actions in the federal courts and where the Federal Constitution, federal statutes, treaties or state statutes are not applicable thereto, Swift v. Tyson in this respect being overruled by the Erie case. Of course, the highest state authority is the final authority on state law.
>
> "State decisions construing state statutes and municipal ordinances are to be followed as the rule of decision in federal courts. The same rule applies to the

2. It further held, of course, that even if this were not the case Appellant would have long since lost any rights it might have had in respect of the disputed area by abandonment (this conclusion also being based on detailed and undisputed evidence).

construction of state constitutions, and it also applies to the interpretation of state administrative orders under authority of state statutes."

In *Albertson* v. *Millard*, 345 U.S. 242 (1953), there was an appeal by plaintiffs from a judgment of the United States District Court for the Eastern District of Michigan holding that the Michigan Communist Control Bill was constitutional. This court held:

"The construction given to a state statute by the state courts is binding upon the federal courts. There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court was commenced only five days after the statute became law.

"There is pending in the Circuit Court for Wayne County, Michigan, a bill seeking a declaratory judgment that the Act is unconstitutional, both on federal and state grounds. That action is being held in abeyance pending our mandate and decision in this case.

"We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action (citing cases).

"The judgment is vacated and the cause remanded to the District Court. . . ."

In *Southern Bell Telephone and Telegraph Company* v. *City of Meridian*, 358 U.S. 639 (1959), this Court dealt with a similar situation, vacated the judgment of the Fifth Circuit, and ordered the District Court (D.C., S.D. Miss.) to hold the case pending interpretation by the state court of a state statute and a state constitutional provision.

In *United States* v. *Burnison*, 339 U.S. 87 (1950), two appeals were combined for decision and they involved the power of the California Supreme Court to declare invalid

testamentary dispositions to the United States by two California residents. This court said:

> "The California Court construed Section 27 of the California Probate Code to prevent a California domiciliary from making an unrestricted testamentary gift to the United States, although such a gift may be made to California, its counties and municipal corporations. The court arrived at this interpretation despite the contention of the United States that it would raise serious constitutional questions. The construction of the California Code by the California Supreme Court is, of course, binding on us. It leaves us, however, with the federal constitutional questions that the United States urged the California Court to avoid."

4. Scope of Police Power

Even if the old charters had possessed the contractual characteristics claimed by Appellant, the Act of 1956 would have been a valid exercise of the police power of the state. To the extent that the 1888 charter "contracts" were thereby impaired the impairment would have been permissible and not proscribed by the contract clause of the Federal Constitution.

Since adoption of the Mississippi Constitution of 1890, the state has expressly reserved the authority to alter, amend or repeal corporate charters (Miss. Const. Art. 7, Sec. 178); but quite apart from this and before that time the state has always had authority to modify or abridge contracts wherever such was needful in a bona fide exercise of police power in the interest of the common welfare. Such authority inheres in sovereignty and is inalienable.

Even if the 1888 charters had amounted to a contractual covenant to the effect that Appellant was given the right to serve the disputed area if and when it should be annexed to the City of Jackson; and 62 years later it be-

came needful that the state act as it did in the 1956 Act to provide for the general welfare; it certainly had power to do so.

Both the preamble and the text of the 1956 Act reveal legislative determination that it was urgent that a statewide system of regulation of certain public utilities be established, including, among other things, rates, services, and *service area allocations* in order to protect and promote the public interest and welfare. The preamble reads as follows:

> "WHEREAS, the services of certain public utilities have been extended to large areas of the state, both within and outside of municipalities, and it is in the public interest that the Public Service Commission of the State of Mississippi be vested with authority to regulate such utilities' rates and services, so as to assure reasonably adequate services to the inhabitants of this state at rates which will be fair and reasonable to the consumer, and provide a fair return to said utilities, both of which objectives are necessary to the general welfare of this state; Now, Therefore, . . ."

The text of the Act included provisions for allocation and certification of service areas to all utilities—Appellant, Appellee and all others. Such allocations were to be made primarily under the "grandfather clause" on the basis of prior service so that each utility would be assured of all of the territory it was then serving as a matter of right and would not be required to sacrifice its investment in facilities for the service of such territory; and each could be certificated additional territory upon petition and proof that the public convenience and necessity required or would require such additional certification to it.

The service areas so certificated to the respective utilities were to be exclusive except where under certain cir-

cumstances the Commission should order partial cancellation of certificates (basically this could be done only in an instance where a utility failed or refused to provide adequate service to a portion of its certificated area). This exclusivity was deemed to be and obviously was in the public interest for many reasons, including economy, avoiding the duplication of service facilities, avoiding unwholesome or "cut throat" competition, avoiding what is known in the industry as "pirating" customers and the like (Section 5 of the Act; A. A4).

In such circumstances the state in the exercise of its police power would have been permitted to adopt the Act for alleviation of the problems involved, even if contractual rights had been thereby impaired. It would not matter whether the contractual obligations were those of the state or someone else. This principle is universally recognized and sustained by the authorities. In 16 CJS, *Constitutional Law*, Section 281, the principle is expounded as follows:

> "In accordance with the rule that the state may not divest itself by contract or otherwise of its police power, one state legislature cannot by any agreement bind itself or its successors not to exercise the police power of the state. The reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. All contracts are made with reference to the possible exercise of the police power of the government and with the possibility of such legislation as an implied term of the law thereof; and *whether made by the state itself*, by municipal corporations, or by individuals or private corporations, they cannot extend to defeat legitimate government authority, but are subject to be interfered with, or otherwise affected by, subsequent statutes enacted in a bona fide and appropriate exercise of the police power, and do not, by reason of the contracts clause of the constitution, enjoy any immunity from such

legislation, regardless of whether the legislative action affects contracts incidentally, or directly or indirectly.

"This rule is not only reasonable, but necessary, since a rule to the contrary would enable individuals, by their contracts, to deprive the state of its sovereign power to enact laws for the public welfare. . . .

"The foregoing rules have been *applied to regulations of public service agencies*, of business, of the professions, of the use of public highways, . . ." (Emphasis added).

The same principle was effectively expounded by the Mississippi Court in the case of *Delta Electric Power Association* v. *Mississippi Power & Light Company*, supra (149 So. 2d at 508) as follows:

"United Gas Corp. v. City of Philadelphia, 238 Miss. 409, 118 So. 2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946, the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature 'reserved the right to pass such laws as may be expedient or necessary in municipal affairs.' *The 1956 Act superseded pro tanto the precedent franchise to United.* The legislature acting under its police power, had the right to vest in the Commission power to determine rates." (Emphasis added).

In the very case now before this Court the Mississippi Court again emphasized the basic need for the exercise

of the police power of the state in the enactment of the 1956 Act in the public interest (222 So. 2d at 405) as follows:

> "The case of Capital Electric Power Ass'n v. Mississippi Power & Light Company, 240 Miss. 139, 150-151, 125 So. 2d 739, 743 (1961) was the first decision of this Court under the Act of 1956 and in it the Court said:
>
> > It is clear from Chapter 372, Laws of 1956, that it was the intention of the legislature that facilities of one utility should *not be duplicated in* the same area. * * * The *manifest policy* of the act is to *prevent duplicating and overriding facilities and certificates.* * * * An existing utility within the certificated area has the *right* and *duty* to provide the service and *must* be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear." (Emphasis by the Court).

Thus, under any view of the old charters, whether that of the Mississippi Court, or that contended for by Appellant, the 1956 Act is valid.

5. Appellant's Authorities and Arguments

Appellant's effort is to bring the old charters of 1860 and 1888 within the familiar doctrine of an "offer and acceptance" type of contract which the non-impairment of contracts clause of the Federal Constitution will protect. It is submitted that what has been said above shows that this cannot be done.

Appellee of course finds no fault with the doctrine; it only says Appellant does not come within it.

This doctrine has been dealt with in many cases, both state and federal, and no good purpose would be served by discussing all or even many of them. Appellee has chosen

to deal with only two which it regards to be leading cases, one a state decision, the other federal, to-wit: *Southern Bell Telephone and Telegraph Company* v. *City of Meridian*, 241 Miss. 678, 131 So. 2d 666 (1961) which will be referred to as "Bell"; and *Russell* v. *Sebastian*, 233 U.S. 195 (1914) which will be referred to as "Russell".

Bell arose under Chapter 38, Laws of 1886. The facts were stipulated and no evidence was introduced. Before 1850 the telegraph had come into public use; and in 1876 the telephone was invented. There was a great surge by the legislature to bring those services into the state. To that end Chapter 38, Laws of 1886, was enacted with this preamble: "AN ACT to Encourage and Facilitate the Construction of Telegraph, Telephone and like lines in the State of Mississippi." The Act extended to any telegraph or telephone company incorporated "by the laws of this or any other state" an invitation to build lines along all public roads, streets and waters of the state free of charge. Bell's predecessor accepted the offer and built lines in Meridian and elsewhere and the building continued and is still going on.

It was held that Section 5(e), Chapter 372, Laws of 1956, which required telephone companies to pay 2% of revenue to municipalities as "rent" for use of the streets was in violation of the contract clause of the state constitution because Bell (and its predecessors) had accepted the "offer" of the state and had built lines along and through the streets of the City of Meridian and the offer and acceptance constituted a contract for the free use of those streets.

In *Bell* there was discussion of the matter of acceptance of the state's offer not being required to be on a "foot by foot" basis as facilities were built, but there was no service area question in the case. The "foot

by foot" doctrine had been developed in *Russell* referred to by the Mississippi Court as perhaps the leading case in this general field of law; and *Russell* did not involve any service area problem either.

Russell is undoubtedly a leading case. The California constitution carried a section adopted in 1885 offering free use of city streets in cities having no municipal light or water works to companies who would build and operate systems in such cities. In 1909 a gas company commenced building and operating a gas manufacturing plant and distribution system in the City of Los Angeles. In 1911 the constitution was amended to in effect withdraw the former offer and give municipalities control over utility companies located and operating within their confines.

Meantime, however, the company in Los Angeles had built a plant big enough to serve the entire city, costing approximately $100,000.00 (big money in those days) over and above what a plant would have cost to serve only the area that had been reached with the laying of pipes (although the company had made good progress in laying pipes). To operate the plant to serve only the area then reached by pipes would have caused a loss to the company of at least $2,000.00 per month. Nevertheless, the City sought by adoption of ordinances to prevent the company from installing pipes in the remaining streets of the City (except it pay the City a consideration).

The Court held that the company had in good faith accepted the offer for the whole city and had been diligent in building its system to reach the entire city; that it was not required to accept the offer "foot by foot, as pipes were laid" but had actually accepted it as a whole and that this was in accordance with the "purpose and express language" of the constitutional provision.

Accordingly, the court held that there had been an offer and acceptance and the company would be permitted to lay its pipes in the remaining streets of the City free of charge.

Appellant has no quarrel with the rule enunciated in *Bell* and *Russell*. But Appellant may not come under that rule because:

(a) The state made no "offer" to the incorporators receiving the charters here involved in 1860 and 1888. To the contrary the incorporators applied for charters and they were issued. It so happened that there was no general corporation statute under which gas, electric or water companies could be organized at those times and there was none granting to such companies the use of streets, roads, etc., for construction of their facilities; therefore, it took acts of the legislature to grant the charters and the easements. That procedure was quite common for these and other types of corporations in those days.

But the fact that the charters and easements were granted by legislative enactments rather than under general statutes did not give the corporations any different or better position than would have been the case had these grants been made under general statutes. And the granting of a charter under a general corporation statute; and the existence of a general statute granting to public utilities the use of rights-of-way, etc.; certainly does not constitute an "offer" which when accepted matures into a contract with attributes such as attended the contract involved in *Bell* or *Russell*.

(b) Neither *Bell* nor *Russell* sheds light on the questions presented by this appeal because neither involved the invasion by one public utility of the certificated service area of another public utility of like kind. As to *Bell*

it is common knowledge which may be judicially noticed by the courts of Mississippi (and it is believed by this court as well) that in this state there are quite a number of other telephone utilities (commonly referred to as "independents") which entered the field after repeal of Chapter 38, Laws of 1886 (it was repealed in 1892), hence never had an opportunity to accept the "offer" which Bell accepted; yet they like Bell have certificated service areas under the 1956 Act. If the Bell company undertook to invade the certificated area of one of the other telephone companies it would not be aided in that effort by the fact that its acceptance of the offer of Chapter 38, Laws of 1886, gave it the free use of the streets, roads and public places throughout the state whether within or without municipalities (a benefit not enjoyed by the others). It would be governed by the regulatory provisions and restrictions of the Public Utility Act of 1956 just as are the others.

(c) Adverting in some measure to the exercise of the police power: Appellant and Appellee each and both enjoyed charter authority under charters granted under general statutes (Appellant under its Florida charter and Appellee under its Mississippi charter) to operate *throughout* the State of Mississippi, both within and without municipalities, prior to adoption of the Act of 1956; but under that Act they were each and both restricted (as to grandfather rights) to areas already being served by them, respectively, on the effective date of that Act; and could secure certification of additional area only upon proof that the public convenience and necessity required it. Thus, the scope of their operating privileges under their corporate charters was stringently reduced and restricted by the regulatory Act of 1956. Their charters constituted "contracts" between them and the state in certain ways.

But these restrictions and limitations do not mean that there has been impairment of contracts in violation of the non-impairment clause of the Federal Constitution. It only means the state has legitimately exercised the police power for the regulation of public utilities for the purpose *inter alia* of bringing to an end "unnecessary and uneconomic duplication of such facilities as between two persons (utilities)" (Act, Section 5(c); A. A5). Such an exercise of the police power of the state is not proscribed by the non-impairment clause of the Federal Constitution. See authorities cited on pages 34-35 hereof.

The very same is true in respect of such operating privileges as Appellant may have under the old charters issued by legislative enactments.

Of the decisions other than *Bell* and *Russell* cited by Appellant on the doctrine enunciated in those cases these are to the same general effect: *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913); *Fletcher* v. *Peck*, 6 Cranch. 87, 137 (1810); *Walla Walla* v. *Walla Walla Water Company*, 172 U.S. 1 (1898); *Minneapolis* v. *Minneapolis Street R. Co.*, 215 U.S. 417; *People ex rel. Woodhaven Gaslight Co.* v. *Deehan*, 153 N.Y. 528, 533 (1897); *City of Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U.S. 649 (1912).

But these additional decisions do not enlarge upon the doctrine in any way; nor is there anything in any of them to suggest any modification of the discussion of the doctrine set forth above; therefore, to analyze and discuss them in detail would neither add to nor detract from the discussions set forth above.

Frost v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929) merely holds that a certificate of public convenience and necessity issued by a state utility com-

mission to a public utility (in this instance a cotton gin was a public utility by statute) is in truth and in fact a franchise from the state; is a valuable property right which will be protected by the Courts; and a certificate holder is entitled to a cease and desist order against a non-certificated competitor seeking to serve in the same area. This holding, of course, sustains Appellee's position in the instant case. To the same effect are these decisions of the Mississippi Court: *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So. 2d 739 (1961); *Mississippi Power Company, et al.* v. *East Mississippi Electric Power Association, et al.*, 244 Miss. 40, 140 So. 2d 286 (1962); *Delta Electric Power Association* v. *Mississippi Power & Light Company*, 250 Miss. 482, 149 So. 2d 504 (1963); *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 250 Miss. 514, 150 So. 2d 534 (1963); and the very case now on appeal, *Mississippi Power & Light Company* v. *Capital Electric Power Association*, 222 So. 2d 399 (1969).

VI. SUMMARY OF ARGUMENT

1. There Has Been No Impairment of the Obligations of a Contract

The charter of Jackson Gaslight Company was granted by legislative enactment in 1860 and amended by legislative enactment in 1888. As so amended it authorized the company to render electric service in the City of Jackson and gave an easement for use of the streets and alleys for building power lines.

The charter of Light, Heat and Water Company was granted by legislative enactment in 1888 and authorized the company to render electric service in the City of Jackson and its suburbs; and it also included an easement for

use of the streets and alleys of the city as well as public roads adjacent thereto.

Appellant, a corporation organized under the laws of Florida, and authorized to do business and doing business in the State of Mississippi, claimed rights under the old charters granted by legislative enactments as aforesaid as successor in interest to the companies receiving those charters. Appellant defended the petition by Appellee for cease and desist order before the Commission on the ground *inter alia* that these old legislative charters gave it authority to serve in the disputed area after that area was annexed to the City of Jackson.

The Commission rejected this claimed right and the Mississippi Court affirmed.

The Mississippi Court was correct in doing so because:

(a) The old charters aforesaid did not grant any rights whatever with respect to the disputed area which lay not within the City of Jackson or its suburbs but several miles away in purely rural area constituted of swamps, woodland, pastures and cultivated fields (and areas in between were of similar character). The evidence showing the location of the disputed area, its nature and character and the nature and character of the area between the City of Jackson and the disputed area was full and in detail, and was not disputed.

That the disputed area was not a "suburb" of the City of Jackson is clearly shown by the authorities cited in the Argument section of this brief and the citations will not be repeated here.

(b) The Legislature in granting the said utilities operating rights in the City of Jackson in 1888 and by grant-

ing unto the City (by means of general statutes) authority from time to time to extend its corporate boundaries did not thereby divest itself of power and authority to grant rights to petitioner with respect to the disputed area at a time (1956) when it lay outside the municipality; and the exercise by the City of the authority to extend its corporate limits in 1960 did not have the effect of canceling the rights granted by the Legislature to petitioner in 1956.

By 1939 some 51 years after the charter of Light, Heat and Water Company authorized it to serve "in the City of Jackson and its suburbs" the disputed area was still of the same type and character as it had always been, that is, rural area, sparsely settled, swampy in large part and the remainder woods and fields. In 1939 there were three "shacks" located in the area and they were served with electricity by Appellee; in 1940 a farmhouse in the area was served by Appellee. Highway 80 traversed the area in 1940 after which it began to build up with small residences and small commercial enterprises. By the time the Public Utility Act was adopted in 1956 Appellee was serving approximately 134 consumers in the area. Meantime, Appellee had held itself out as being ready, able and willing to provide service to all who desired it in the area; and it served all who applied.

Neither Appellant nor any other electric utility has ever at any time served the area or any part of it (except Appellee had connected 6 scattered services around the edges sometime prior to 1956). These services will be referred to more specifically later herein.

The 1956 Act by Section 5(b) thereof the so-called "grandfather clause" gave Appellee a right to a certificate of public convenience and necessity to continue serving the area as it had done before.

The legislature did not thereby exceed its authority. Statutes will be construed in accordance with the "real intention" of the legislature in enacting them; and will be construed so as to avoid bringing about unforeseen, unthought of or inequitable results. Manifestly, it was not the intention of the legislature in granting a charter in 1888 to serve the City of Jackson and its suburbs to tie its own hands so that thereafter for all time to come it would be without authority through the exercise of the police power to provide for and regulate public utility services in any areas roundabout the City of Jackson, whether near or far, which might ever at any time be annexed to the City of Jackson.

Before the disputed area was annexed to the City of Jackson in 1960 (the event which Appellant claims matured its right to serve therein) the legislature had already in 1956 under the terms of the Act granted unto Appellee the right to a certificate to serve the area and this right had been implemented by the issuance of the certificate by the Commission. This grant to Appellee was valid. To hold otherwise would be to accord to the old charter granted by legislative enactment unforeseen, unthought of and inequitable effects; indeed effects destructive of the public interest.

Actually, there was no general corporation statute or other statute under which the charter could have been granted at that time, hence it was necessarily granted by legislative enactment (as were virtually all other corporate charters in those days).

An added reason why that charter may not be accorded such attributes is that it applied not only to electricity but to gas and water. Under the 1956 Act gas companies and water companies also received certificated service areas roundabout the City of Jackson. Thus, un-

der Appellant's contention the state would have tied its hands so that at no time after 1888—and into the future forever—could it provide for and regulate electric, gas or water utilities in the vicinity of Jackson and provide for exclusive service rights in certificated areas (as is done in the 1956 Act for good reasons) lest at any time the corporate limits of the City be expanded and the exclusivity of public utility certificates emasculated.

(c) Even if Appellant had acquired service rights in the disputed area in 1888 (which is certainly denied and respondent *doesn't even claim* any such rights except following extension of the corporate limits in 1960) those rights would have long since been abandoned and lost because Appellant not only did not serve the area but stood by and acquiesced in Appellee's serving it from 1939 to 1960, a period of 21 years, without protest or objection; and in so serving it, Appellee necessarily invested large sums in distribution facilities therein and acquired more than 200 valuable service contracts therein under circumstances and conditions justifying its belief that it would serve the area indefinitely.

Appellant, if it acquired any rights by annexation of the disputed area to the municipality in 1960, has abandoned and lost such rights by: (a) going for 72 years (1888-1960) without serving the area; (b) during 21 of those years (1939-1960) standing silently by and acquiescing in Appellee's service of the area necessarily involving substantial investments in facilities and serving more than 200 consumers therein under circumstances warranting it to believe and believing that it would serve the area indefinitely; (c) agreeing in 1959 before grandfather certificates were issued to Appellee and Appellant by the Commission that the area should be certificated to Appellee; and (d) withdrawing all objections in Docket U-84, Appellee's

grandfather application, before the Commission and consenting that the area be certificated to Appellee.

(d) In 1959 Appellant and Appellee reached an agreement as to areas that would be certificated to them, respectively. The effort to so agree had been undertaken at the request of the Commission made some three years earlier. Agreement having been reached Appellant and Appellee jointly petitioned the Commission in Docket U-399 to approve of the agreement; and the Commission did approve it. Thus Appellant unequivocably agreed that the area should be certificated to Appellee; and will not now be heard to deny this. If Appellant had thought then that it had any rights stemming from the old charters to serve the disputed area because it was a "suburb" of the City of Jackson, it would have said so. It is evident that Appellant did not then think that it had ever had such a right; or, it knew it had abandoned any right it might have had.

2. Holdings of Mississippi Court

The Mississippi Court sustained each of the propositions set forth under "(a)" through "(d)" above.

3. This Court Will Accept the Mississippi Court's Interpretation of Mississippi Legislative Enactments, Including Legislative Charters

This Court will accept the interpretation of a state court of last resort of legislative enactments of the state. This rule includes the state Constitution, general statutes, special legislative enactments, municipal ordinances and administrative orders under authority of state statutes.

Manifestly, therefore, it includes a legislative grant of a charter of incorporation.

Therefore, this Court will accept the Mississippi Court's interpretation that the old legislative charters granted no rights whatever to serve the disputed area; that had they granted any such rights those rights have under the facts of this case long since been abandoned by Appellant; and that the rights granted to Appellee to serve the disputed area pursuant to the 1956 Act are valid rights as against all claims of Appellant.

4. Scope of Police Power

Even if the old charters had possessed the contractual characteristics claimed by Appellant the Act of 1956 would have been a valid exercise of the police power of the state nevertheless. To the extent that the old 1888 charters were thereby impaired the impairment would have been permissible and not proscribed by the contract clause of the Federal Constitution.

The state has always possessed police power to act in the interest of the common welfare even where this may involve the impairment of contracts; even the state's own contracts; and such action is not within the protection of the contract clause of the Federal Constitution.

This authority inheres in sovereignty and is inalienable.

Both the preamble and the provisions of the 1956 Act reveal an urgent need for the exercise of the police power in the regulation of public utilities in the state, including the electrical industry. A basic purpose was to eliminate an intolerable condition then existing involving duplication of facilities, unwholesome or "cut throat" competition, "pirating" of customers and the like.

Thus, it was determined to issue to each electric utility a grandfather certificate on an *area basis* authorizing it to

continue serving the area it was serving on the effective date of the Act; and giving it *exclusive* service rights in that area (except where it failed or refused to provide adequate service). After this the utility could secure additional service area only upon petition to the Commission and proof showing public convenience and necessity.

Necessarily, electric lines having been crisscrossed and duplicated in the past in every instance there would be a few "stray" services of another utility in the area to be certificated to any particular utility; and this accounts for the 6 scattered services of Appellant in the disputed area in which at the time the Act was adopted in 1956 Appellee had some 134 services. The Commission adopted the plan with respect to electrical utilities and all other utilities of "freezing" these stray services so that the neighboring utility could continue serving them although it could not render new services in the area which was being predominantly served by the other utility (to which the certificate was issued) on the effective date of the Act. This was a necessary expediency and it worked well.

The authorities are in agreement that under the conditions manifestly existing at the time of the adoption of the Act; in fact, under conditions which any court will judicially notice would prevail in the absence of any regulation; the state had the police power to regulate even if contract rights were impaired thereby.

Appellee says Appellant had no such rights; but had it had such rights the Act would be valid nevertheless.

5. Appellant's Authorities and Arguments

Appellant's effort is to bring the old charters of 1860 and 1888 within the familiar doctrine of an "offer and acceptance" type of contract which the non-impairment of contracts clause of the Federal Constitution will protect.

Appellee finds no fault with that doctrine; but it says Appellant does not come within it.

In the Argument section of this brief Appellee has chosen two leading cases, one a state case, the other federal, as a basis for discussing the rule and showing that Appellant does not come under it. These cases are *Southern Bell Telephone and Telegraph Company* v. *City of Meridian*, 241 Miss. 678, 131 So. 2d 666 (1961), referred to as "Bell"; and *Russell* v. *Sebastian*, 233 U.S. 195 (1914), referred to as "Russell".

Bell arose under Chapter 38, Laws of 1886. That Act actually *urged* telegraph and telephone companies to come into the state or accept charters from the state and operate therein. As an inducement it offered free of charge rights-of-way along all the roads, streets and waters of the state. The Bell company accepted and built lines among other places in the City of Meridian. It fully served that city. In 1956, Section 5(e), Chapter 372, Laws of 1956, required telephone companies to pay 2% "rent" to municipalities for use of their streets.

It was held that the Bell company having accepted the state's offer and acted upon it a contract matured which would be protected under the contract clause of the state Constitution.

In *Russell* the Constitution of California adopted in 1885 carried a section offering the free use of streets in cities having no municipal light or water works to companies who would build and operate such systems in such cities.

A gas company accepted and made rapid progress in building its lines throughout the city but had not reached all parts of the city when in 1911 the constitutional pro-

vision was changed so as to withdraw the offer and vest in municipalities authority over such utilities. Thereupon, the City demanded that the gas company discontinue building its pipes in the remaining streets of the city (except it pay the city a consideration).

It was held that the constitutional offer of 1885 had been fully accepted as to the city as a whole in accordance with the "purpose and express language" of the constitutional provision; and the gas company having already built a plant much bigger than would be required to serve just the area where pipes had been laid and having been diligent in laying pipes and having made good progress in doing so, it would be permitted to lay its pipes in the remainder of the streets of the city. The offer was as to the city as a whole and was so accepted, hence there was a contract which was protected by the constitutional provision.

Appellant has no quarrel with the rule enunciated in *Bell* and *Russell*. But Appellant may not come under the rule because the state made no "offer" to the incorporators receiving the charters in 1860 and 1888; only granted an application for a corporate charter to do business. There being no general statute under which the charters could be granted they necessarily were granted by legislative enactments, this being the method in use with respect to electric, gas and water companies as well as many other types of corporations in those days.

Appellee finds that a number of other cases cited by Appellant on this doctrine are to the same general effect as *Bell* and *Russell*; but nothing in those decisions warrants individualized analyses thereof.

One of Appellant's cases, *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929), clearly supports

Appellee's position in the instant case. It holds that a certificate of public convenience and necessity issued by a state utility commission to a public utility is in truth and in fact a franchise from the state; is a valuable property right which will be protected by the courts; and a certificate holder is entitled a cease and desist order against a non-certificated competitor seeking to serve in the same area. That is precisely what the Mississippi Court has held in a number of cases.

VII. CONCLUSION

1. The old charters of 1860 and 1888 granted no rights to serve in the disputed area which was neither in the City of Jackson nor in its suburbs.

2. The grant to Appellee of the right to serve the disputed area under the Public Utility Act of 1956 was a valid grant, said area lying outside the City of Jackson and having been served fully and adequately by Appellee since 1939.

3. Even if Appellant had acquired rights to serve in the disputed area by virtue of the charters of 1860 and 1888 it lost those rights by failure to serve and abandonment.

4. Even if Appellant had acquired rights to serve in the disputed area by virtue of said charters of 1860 and 1888 whether such rights had been abandoned or not the Public Utility Act of 1956 was a valid exercise of the police power of the state in the interest of the general welfare; was not proscribed by the contract clause of the Federal Constitution; and under the terms of that Act and its certificate of public convenience and necessity Appellee has the exclusive right to serve the disputed area.

5. Appellant has wholly failed to show that it has contractual rights under the charters of 1860 and 1888

which will be protected under the contract clause of the Federal Constitution.

Appellee therefore respectfully submits that this motion to dismiss the appeal should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. HARVEY HEDGEPETH, Attorney of Record for Capital Electric Power Association, Appellee in the above styled cause, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing Motion to Dismiss upon Appellant in the following manner: By depositing copies thereof in sealed envelopes in the United States Post Office in Jackson, Mississippi, with first-class postage prepaid, properly addressed to each of the Attorneys of Record for Appellant, Mississippi Power & Light Company, to-wit: Bernard G. Segal, Esquire, 1719 Packard Building, Philadelphia, Pennsylvania, 19102; Samuel D. Slade, Esquire, 1719 Packard Building, Philadelphia, Pennsylvania, 19102; Sherwood W. Wise, Esquire, 925 Electric Building, Jackson, Mississippi, 39201; Garner W. Green, Esquire, 800 Electric Building, Jackson, Mississippi, 39201; and Joshua Green, Esquire, 800 Electric Building, Jackson, Mississippi, 39201.

I further certify that I have caused to be mailed, first-class air mail, postage prepaid, 40 printed copies thereof to the Clerk, United States Supreme Court, Washington D. C., 20520.

THIS October 16, 1969.

T. Harvey Hedgepeth

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APPENDIX

A1

APPENDIX 1

Sections 1, 4, 5, 6, 22, 26 and 28 of Chapter 372, *Mississippi Laws of 1956* (Sections 7716-01, 7716-04, 7716-05, 7716-06, 7716-22, 7716-26 and 7716-28, Volume 6 Recompiled, *Mississippi Code of 1942*)

Section 1. *Definitions.* A. The term "corporation," when used in this act, includes a private or public corporation, a municipality, an association, a joint stock association or a business trust.

B. The term "person," when used in this act, includes a natural person, a partnership of two (2) or more persons having a joint or common interest, a co-operative, non-profit, limited dividend or mutual association, a corporation as hereinbefore defined, or any other legal entity.

C. The term "municipality," when used in this act, includes any incorporated city, town or village.

D. The term "public utility," when used in this act, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

(1) The generation, manufacture, transmission or distribution of electricity to or for the public for compensation.

(2) The transmission, sale, sale for resale, or distribution of natural, artificial, or mixed natural and artificial gas to the public for compensation by means of transportation, transmission, or distribution facilities and equipment located within this state, but shall not include the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, nor the distribution or sale of liquefied petroleum gas.

(3) The transmission, conveyance or reception of any message over wire, or by radio, or otherwise, of writing, signs, signals, pictures and sounds of all kinds by or for the public, where such service is offered to the public for compensation; and the furnishing, or the furnishing and maintenance, of equipment or facilities to the public, for compensation, for use as a private communications system or part thereof; provided, that no persons or corporations not otherwise a public utility within the meaning of this act shall be deemed such solely because of engaging in this state in the furnishing, for private use as last aforementioned; and provided further that nothing in this act shall be construed to apply to television stations, radio stations or community television antenna services.

(4) The transmission, distribution, sale or resale of water to the public for compensation.

(5) The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity described in sections 1 D (1), 1 D (2), 1 D (3) and 1 D (4) of this act only to himself, his employees or tenants as an incident of such employee service or tenancy, and provided such services are not sold or resold to such tenants or employees on a metered or consumption basis.

E. The term "rate," when used in this act, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility for any service, product or commodity described in this section, offered by it to the public, and any rules, regulations, practices or contracts relating to any such compensation, charge, fare, toll, rental or classification; except, however, the term "rate" shall not include charges for electrical current furnished, delivered or sold by one public utility to another for resale.

F. A public utility's business other than of the character defined in subparagraphs (1) to (4) of subsection D of this section is not subject to the provisions of this act.

G. The word "commission," when used in this act, shall refer to the Public Service Commission of the State of Mississippi as now existing, unless otherwise indicated.

H. Any public utility as defined in paragraph D above, owned or operated by a municipality shall not be subject to the provisions of this act, except as to extension of utilities greater than one mile outside of corporate boundaries after the effective date of this act.

* * *

Section 4. *General jurisdiction and powers.*—Subject to the limitations imposed in this act, and in accordance with the provisions hereof the commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities as herein defined, except and provided, however, that the commission shall not have jurisdiction over the production and gathering of natural gas, or the sale of natural gas in or within the vicinity of the field where produced, nor over the facilities and equipment utilized in any such operations including but not limited to such facilities as separators, scrubbers, and gasoline plants of all types. Provided, further, the commission shall not have jurisdiction to regulate the rates or the following sale of commodities or services: (1) sales of gas, water or electricity by municipalities to such persons as said municipalities are authorized by law to serve; (2) sales of gas or electricity by co-operative gas or electric power associations to the members thereof as consumers, except as provided by section 5, paragraphs (d) and (e) where service is rendered in a municipality.

Section 5. *Certificate of public convenience and necessity: when required.*—No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D (3) of section 1, of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of

this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or addition to their facilities within their respective certif-

icated areas of said municipality, including any extensions of the corporate limits thereof.

When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

(e) . In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1 D (1) and 1 D (2) and in the case of a utility defined in 1 D (3) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience

and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise

granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided, however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

In the case of a public utility as defined in section 1 D (3) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the ef-

fective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided.

Section 6. *Extension of service.*—The commission may, after hearing, upon notice, by order in writing, require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities within the certificated area upon findings and order that such extension is reasonable and practicable, and provided further, that in the case of gas and water a sufficient supply is available and obtainable therefor.

* * *

Section 22. *Decision.*—After the conclusion of a hearing the commission shall make and file its findings and order, and its opinion, if any. All findings shall be supported by substantial evidence presented in the hearing and shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding and the basis of the commission's conclusion. A copy of such order certified under the seal of the commission, shall be served upon the person against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceedings or their attorneys. Said order shall take effect twenty (20) days after the service thereof, unless otherwise provided, and shall continue in force, either for a period which may be designated therein or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within twenty (20) days, the commission may grant and prescribe such additional time as in its judg-

ment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

* * *

Section 26. *Review.*—(a) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for rehearing has been refused or deemed refused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided

however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be; but in case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's order as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

* * *

Section 28. *Appeals.*—Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

If the party taking the appeal has theretofore furnished security as provided in section 27 of this act, or, in the case of an appeal from a judgment involving an order of the commission affecting rates, has filed a bond conditioned as provided in section 10 or section 27, the taking of an appeal to the Supreme Court shall operate as a supersedeas without the furnishing of further security or bond, provided, that in such cases the Supreme Court may, upon

application to it, require such additional security, or such additional bond conditioned as provided in section 10 or section 27, as in its opinion will adequately secure the other party to the appeal, or parties who may become entitled to refunds, against loss in the event the judgment under review is affirmed

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 611

MISSISSIPPI POWER & LIGHT COMPANY,
Appellant,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS

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1. In its motion to dismiss, Appellee places great weight on the contention that Appellant had agreed that the disputed area be certificated to Appellee. For example, Appellee stated (Motion, p. 47) that "* * * Appellant unequivocably agreed that the (disputed) area should be certificated to Appellee * * *." With deference, such statements, made repeatedly (Motion, pp. 11, 24, 26), misstate the nature of the actual agreement.

The agreement of August 12, 1958, to which Appellee refers, specifically provides in pertinent part as follows (R. 1556-1557):

> "3. No agreement has been reached with respect to customers served or areas claimed by Association in the corporate limits of Utica, Clinton and Flowood, *nor is there any understanding in regard to the rights of either party within any area upon its future incorporation in the corporate limits of any municipality. This memo of understanding shall not prejudice the rights that either party may have with respect to such area.*
>
> "4. The area agreement contained herein simply provides that neither party will object to areas being assigned by the Public Service Commission in conformity herewith. It does not attempt to define the legal status of the areas. *Other than as herein set out,* neither party waives any rights accruing to it from the Public Utilities Act of 1956, *from a franchise* or from any other legal source. * * *." (Emphasis is ours, unless noted.)

Thus, it is clear that the agreement of 1958 in no way resolves the issue presented in this case. To the contrary, the paragraphs of the agreement quoted above make plain that Appellant entered into no agreement with respect to the effect of annexation by the City of Jackson or with respect to rights which might be held to stem from the franchises. The effect of annexation and the subsisting validity of the legislative franchises held by Appellant are precisely the matters which are here in issue.

2. At several points in its argument (Motion, pp. 10, 11, 19, 25), Appellee also suggests that Appellant had never served the area in dispute. Appellant was bound by contract to serve the "city of Jackson" and has expanded its service to meet its expanding boundaries over the years. As of the date of the last city expansion, March 17, 1960,

Appellant was the sole supplier serving the entire City of Jackson as it then existed (Vol. VIII, R. 983). The record is clear that, when the City of Jackson expanded to annex the disputed area in 1960, Appellant likewise expanded its service to serve the disputed area (Finding 15, p. A28 of Order, Vol. XI, R. 1602). In fact, the Commission found that Appellant, unless ordered to cease and desist would continue to offer to serve the disputed area (Finding 16, pp. A29-A30 of Order, Vol. XI, R. 1604). Thus, it is clear that Appellant did not intend to abandon the area in dispute, especially after annexation in 1960. How can it be claimed that Appellant abandoned prior to 1960 its right to serve an area that was then not even within the "city of Jackson" so as to be within its franchised area? It must not be overlooked that Appellant has two franchises[1]: one covering "the city of Jackson and its suburbs" (Vol. V, R. 630) but the other covering "the city of Jackson" only (Vol. V, R. 628). Even as to the suburban franchise, if the disputed area was not a suburb in 1888, there was no real demand for service in the disputed area—three shacks and a farmhouse, with a dirt road—until Highway 80 was opened in about 1940 (Motion, pp. 11-13); and Appellant had installed six services in the disputed area by 1956 (Vol. VII, R. 836). Note that these charter franchises were "* * * the only franchises * * *" specifically covering the City of Jackson and its suburbs claimed by Appellant from 1944 until March 29, 1956 (Vol. X, R. 1446) and that these franchises were relied on in a prospectus filed with the Securities & Exchange Commission in 1944, under which bonds are still outstanding (Ex. 49, Vol. X, R. 1459). Thus as a matter of plain fact, Appellant has not abandoned but, rather, has asserted and exercised its

1. Under state law, Appellant had the right to have several, independent franchises. *Southern Bell Tel. & Tel. Co. v. Meridian*, 241 Miss. 678, 131 So.2d 666, 674 (1961).

right to serve the disputed area. The abandonment argument of the court below runs counter to the ultimate finding on which the Commission based its cease and desist order: the Appellant's willingness to serve in the disputed area.

3. Appellee claims (Motion, p. 29) that the decision of the Supreme Court of Mississippi in interpreting the charter franchises establishes a rule of decision binding on this Court; but, with deference, this is not the rule where the state statute impairs the obligation of a contractual franchise. *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1941); *Russell v. Sebastian*, 233 U.S. 195, 202 (1914).

4. Appellee raises an argument not considered or ruled upon by the Commission or the courts below. Appellee argues that the action of the Commission, affirmed by the courts below, must be viewed as a valid exercise of police power.

The Commission did not find that the police power of the state required that appellant's contracts be impaired. To the contrary, the Commission specifically refused to consider the validity of the contracts at all (Order, pp. A30-A31; Vol. XI, R. 1605). Similarly, the courts below made no finding with respect to police power.[2] Thus, appellant submits that the result below cannot here be justified as having been grounded on police power considerations.

In any event, the argument lacks force in the circumstances of this case. Appellee quotes from the case of *Delta Electric Power Association v. Mississippi Power & Light Company*, 250 Miss. 482, 149 So.2d 504 (1963). The

2. Appellee recognized this in its Summary of Argument, since it presented the police power argument separately from those which it contended were approved by the Supreme Court of Mississippi (Appellee's Br., pp. 47-48).

court in that case held that a *municipality* lacked the power to grant a franchise in an area not yet a part of the municipality. Thus, the issuance of a grandfather certificate covering an area not yet annexed by the municipality was held to be a valid exercise of the police power, since the only franchise involved was a *municipal* franchise, and therefore there were no "preexisting rights as to the area involved * * *." 149 So.2d at 514. Putting to one side the fact that *Delta* specifically dealt with the police power point, that decision is not controlling in the instant case, since appellant's franchises are *state* franchises. The distinction between state and municipal power is critical to the issue in this case.

It is well established that state legislation may be considered a binding contract under appropriate circumstances. As this court explained in *Indiana, ex. rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938):

> "* * * The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy. Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, § 10. If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the legislature. * * *".

A franchise granted by a state to a public utility is such a contract, and such a grant has been held not to be contrary to the police power of the state. *New Orleans Gas Light Company* v. *Louisiana Light and Heat Producing and Manufacturing Company*, 115 U.S. 650 (1885). In

fact, this Court found that *the exclusiveness* of a franchise granted to the gas company "* * * has no relation whatever to the public health, or to the public safety." 115 U.S. at 672. The Court said that, while the state could regulate the Gas Company if the manufacture of gas became "* * * injurious to the public health, the public comfort, or the public safety * * *", * * * "[i]t cannot be said with propriety that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health and safety." 115 U.S. at 672. The courts have made a distinction between the cancellation of a franchise, as has been done with appellant's franchise in the disputed area, and the regulating of the grantee of the franchise. *State of Tennessee* v. *United States*, 256 F.2d 244 (1958).

The case of *Grand Trunk Western Railway Company* v. *City of South Bend*, 227 U.S. 544 (1912), illustrates this distinction. *Grand Trunk Western Railway* was granted a charter by the State of Indiana. The city of South Bend passed an ordinance granting the company the right to construct its railroad through the streets of the city, which included permission to construct double tracks along a certain street. The railroad initially constructed such double tracks along approximately one-half the permitted area. Twenty years after the first double track was constructed, the railroad began to extend the double track along the remainder of the permitted area. South Bend then repealed its original ordinance insofar as it granted the right to construct a double track. The city, noting the great increase in its population, claimed that its action was a proper exercise of the police power. This Court did not find that the repeal of the ordinance was necessary, and held that the facts did not show "* * * that the repeal was the reasonable exercise of the police power, but on the contrary showed that the contract of 1868 was materially

impaired by the ordinance of 1901 in violation of Art. I, § 10 of the Constitution." 227 U.S. at 558. The Court explained, at 227 U.S. at 554:

> "* * * the inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is inseparably connected with the exercise of the franchise granted by the State. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated, because of the very growth in population and business the railroad was intended to secure."

Furthermore, even if police power were a valid issue in this case, it is nevertheless subject to supervision of this Court:

> "* * To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. * * *" *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

It is obvious that not all state action can be considered proper exercise of the police power. If any state action could be justified as an exercise of the police power, the state could simply by so acting impair any contract. This would render the protections of Art. I, § 10 of the Constitution worthless. If legislation is to be justified as proper exercise of the police power, especially when it abridges

constitutional rights there must be a showing that such action is necessary for the public good. No such showing has been made in this case.

> "* * * Governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance." *Butler v. Little Rock*, 361 U.S. 516, 525 (1960).

The public is not being denied service. The only issue is whether Appellee can be given the privilege of furnishing exclusive service, with a resulting impairment of Appellant's franchise. And this issue was resolved below without any consideration of the question whether the grant of an exclusive franchise to Appellee was necessitated by the demands of the public good.

It must be kept in mind that Appellant serves the entire City of Jackson exclusively, except for the disputed area, a tiny island (Vol. IX R. 1429). What is the merit in requiring the street lighting of the City to be split into two systems? There is an obvious benefit in having one unified system and the City of Jackson had chosen Appellant to perform this service. (Findings Nos. 7, 8 and 9, p. A-26 Jurisdictional Statement.)

In *Indiana, ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), a teacher who achieved "permanent" status under the Indiana Teachers' Tenure Act of 1927, had her employment terminated after this statute was amended in 1933. The amendment permitted such termination without regard to the conditions and limitations of the earlier act. The teacher argued that she had a vested property right in her indefinite contract under the 1927 Act and that this could not constitutionally be impaired by repeal of the statute. The state argued that every contract was subject to the police power of the state, and that the legislature

had validly exercised that reserved power when it repealed the Teachers' Tenure Act. This Court found that the police power had not been properly exercised in that case because there was no showing of public need.

5. Appellee makes certain policy arguments to support its interpretation of the Act. Appellee argues that, if the appellant's franchise is upheld, any municipality, by annexation, could invalidate certificates granted by the Commission. However, this exaggerates appellant's position. Appellant does not argue that appellee's grandfather certificate is now invalid. Rather, appellant simply argues that under its franchises, it now has joint rights with appellee in the disputed area. Thus, the validity of the grandfather certificate is not affected - only its exclusiveness.

Recognizing that only exclusivity is here involved, appellee points to the preamble of the Act which contains an expression of policy against unnecessary duplication. Concededly, the Act does caution against action by the Commission which would result in unnecessary duplication. But this statutory guideline has not been interpreted by the Commission as overriding the protection of existing contract rights. To the contrary, the Commission has followed the policy of protecting existing rights even where such protection results in some duplication in service. Thus, when one utility has services within the grandfather certificate area of another, the Commission has not held that the rights to such existing services must be lost but has, instead, ruled that such services can remain in the area certificated to the other utility (Order, at App. 28).

In short, the statutory caution against unnecessary duplication has no application where the issue, as here, is whether there are existing franchise or contractual rights. If such rights exist, and appellant submits that they do

here exist, they must be respected and enforced unless the Commission finds - no such finding has here been made - that they must be abrogated for the public good.

The Public Service Commission Act of Mississippi itself provides in Section 7716-39, *Recompiled Mississippi Code of 1942*, thereof the following:

> "Repeal of conflicting acts. - Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or *any rights accruing, accrued or established* prior to the effective date of this act."

In conclusion, we respectfully call to the Court's attention that this Court has already rejected the attempt of a state to impair a valid franchise by passing legislation such as the Public Service Commission Act of Mississippi (Sections 7716-01 et seq., *Recompiled Mississippi Code of 1942*) and requiring a utility to accept a certificate of public convenience and necessity - - - in that case, called an "indeterminate permit" - - - in lieu of its pre-existing franchise. In *Superior Water, Light & Power Co. v. City of Superior*, 263 U.S. 125, 134, 137 (1923), this Court declared:

> "Considering the opinions of this Court, it seems clear enough that a valid contract resulted from the dealings between the city of Superior and plaintiff in error, whereby each became obligated to do certain specified things."
>
> * * *
>
> "The integrity of contracts - - - matter of high public concern - - - is guaranteed against action like that here disclosed by Section 10, Art. 1, of the Federal Constitution. 'No state shall - - - pass any - - - law impairing the obligation of contracts.' It was beyond

the competency of the legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract."

Since the appellant is bound to serve in the disputed area, the State is bound to let it serve.

We, therefore, respectfully submit that this Court should overrule the Motion to Dismiss Appeal filed herein and should exercise its jurisdiction to correct the serious errors apparent in the record.

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CERTIFICATE OF SERVICE

I, Joshua Green, one of the attorneys for the Appellant herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served printed copies of the foregoing Response to Motion to Dismiss Appeal on the Appellee in the manner following:

By mailing two copies thereof in a duly addressed envelope, with postage prepaid, to T. Harvey Hedgepeth, Esquire, Deposit Guaranty National Bank Building, Jackson, Mississippi 39201; and Goza, Case & Montgomery, Canton, Mississippi 39046.

I further certify that I have caused to be mailed postage prepaid, forty (40) printed copies thereof to the Clerk, United States Supreme Court, Washington, D. C. 20520.

This, the 28th day of October, 1969.

JOSHUA GREEN
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One of the Attorneys for Appellant

SUPREME COURT OF THE UNITED STATES

October Term, 1969

MISSISSIPPI POWER & LIGHT CO. *v.* CAPITAL ELECTRIC POWER ASSOCIATION

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 611. Decided December 8, 1969

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.